TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 735.

THE PEOPLE OF THE STATE OF NEW YORK EX REL. THE TWENTY-THIRD STREET RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE BOARD OF TAX COMMISSIONERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

FILED JULY 1, 1906.

(18,996.)

(18,996)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 345.

THE PEOPLE OF THE STATE OF NEW YORK *EX REL.* THE TWENTY-THIRD STREET RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE BOARD OF TAX COMMISSIONERS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW YORK.

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LIST OF STIPULATIONS.

	Original.	Print
That referee's oath is waived	65	43
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That franchises of the 23d Street Railway Company were acquired under chapter 823, Laws of 1869; chapter 521, Laws of 1872, and chapter 100, Laws of 1873	188	43
That true and correct copies of the aforementioned acts are annexed to return	188	43
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That a true and correct copy of receipt of Andrew H. Green, comptroller, is annexed to return	188	44
That franchises of Bleecker St. and Fulton Ferry R. R. Co. were acquired under chapter 514, Laws 1860, and chapter 199, Laws 1873	629	44
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a Court of Appeals.

STATE OF NEW YORK, *ss:*

Pleas in the court of appeals, held at the capitol, in the city of Albany, on the 28th day of April, in the year of our Lord one thousand nine hundred and three, before the judges of said court.

Witness, the Hon. Alton B. Parker, chief judge presiding.

W. H. SHANKLAND, *Clerk.*

Remitt[illegible] ur April 29th, 1903.

b THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The Twenty-third Street Railway Company, Respondent,

ag'st

GEORGE E. PRIEST & Ors., Tax Commissioners, Composing the State Board of Tax Commissioners, Appellants.

Be it remembered, that on the 23rd day of March, in the year of our Lord one thousand nine hundred and three, George E. Priest & ors., tax commissioners, &c., the appellants in this proceeding came here into the court of appeals, by John Cunneen, attorney general, their attorney, and filed in the said court a notice of appeal and return thereto from the order of the appellate division of the supreme court in and for the third judicial department. And The Twenty third Street Railway Company, relator, the respondent in said proceeding action, afterwards appeared in said court of appeals by Henry A. Robinson, its attorney.

Which said notice of appeal and the return thereto filed as aforesaid, are hereunto annexed.

c Whereupon, the said court of appeals having heard this proceeding argued by Mr. John Cunneen, attorney general and Mr. Wm. H. Wood, of counsel for the appellants, and by Messrs. Charles F. Brown, David B. Hill, Frank H. Platt and Wm. H. Page Jr., of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the order of the appellate division of the supreme court appealed from herein be, and the same hereby is reversed and that of special term affirmed, with costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this court, be remitted to the said supreme court, there to be proceeded upon according to law.

d Therefore, it is considered that the said order be, and the same hereby is, reversed &c., &c., as aforesaid.

And hereupon, as well *as* the notice of appeal and return thereto aforesaid as the judgment of the court of appeals aforesaid, by them given in the premises, are by the said court of appeals remitted into

the supreme court of the State of New York, before the justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said supreme court before the justices thereof, &c.

W. H. SHANKLAND,
Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office.

ALBANY, *April 29th*, 1903.

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said proceeding in the court of appeals, with the papers originally filed therein attached thereto.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND, *Clerk.*

e Original.

Filed Mar. 23, 1903.

In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE TWENTY-third Street Railway Company, Respondent,
against
STATE BOARD OF TAX COMMISSIONERS, Appellants.

Papers on Appeal.

John Cunneen, attorney-general, attorney for appellants, capitol, Albany, N. Y.

Henry A. Robinson, attorney for relator-respondent, No. 621 Broadway, New York city.

Filed Albany county, N. Y. May 1 11.22 a. m. 1903 Clerk's office.

f In the Court of Appeals of the State of New York.

Statement.

In the Court of Appeals of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE TWENTY-third Street Railway Company, Respondent,
against
STATE BOARD OF TAX COMMISSIONERS, Appellants.

Appeal from an order of the appellate division of the supreme court, third department, granted on January 6, 1903, and entered in

the Albany county clerk's office on February 20, 1903, except from that part of said order which affirms the order of the special term therein upon the facts. The order appealed from affirms on the facts and reverses on the law, an order of the special term made by Mr. Justice Herrick, and entered on July 15, 1902, confirming the report of the referee, Hon. Robert Earl, now deceased, and declares the assessment in question to be illegal, and void, and
g directs it to be stricken from the assessment-roll.

The report of the referee directed that the assessment of the special franchise of the relator be reduced to $1,326,114.92, and, as so reduced, be confirmed.

The order of reference directed the referee to take and report to the court such evidence, upon the several issues of fact raised by the pleadings, as might be adduced before him, with his findings of fact and conclusions of law.

The names of the original parties hereto are as above, and no change in them or their attorneys has taken place.

1 In the Supreme Court, State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE Twenty-third Street Railway Company *against* STATE BOARD OF TAX COMMISSIONERS. } Petition.

To the supreme court of the State of New York:

The petition of the Twenty-third Street Railway Company respectfully shows to the court:

That at the times hereinafter mentioned it was, and still is, a railroad corporation created and existing under and pursuant to the laws of the State of New York, and has its principal office in the city of New York.

That on October 1st, 1899, it was, and still is the owner of a street surface railroad or railroads constructed, maintained and operated in, upon and through certain streets, highways and public places in the borough of Manhattan, in the city of New York, together with the franchise, rights and permission to construct, maintain and operate the same, which franchise, rights and permissions, together with the tangible property of said railroads situated in, upon, under or above said streets, highways and public places is known and denominated in the tax law of this State as a special franchise.

That since January 1st, 1900, George E. Priest, J. Edgar
2 Leaycraft and Lester F. Stearns have constituted, and still constitute the State Board of Tax Commissioners.

Your petitioner further shows that, pursuant to section 43 of the tax law of the State, and within thirty days after the said section took effect, it made a written report to said State Board of Tax Commissioners as to all matters required by said section to be reported

to said board, and has, in the manner required by law, made all reports and supplemental reports required by law or by said board to be made to it.

That it also reported to said board all statutes of the State, general or special, and all resolutions of the common council of the city of New York relating to said special franchise, and all provisions and conditions of law relating to the payment of percentages of the gross receipts from the operation of said railroad or of a gross sum into the treasury of the city of New York, which provisions of law were, by said statutes and resolutions, made conditions to the acceptance of said special franchise and were agreed to by your petitioner and have always been fully performed.

That in said reports and supplemental reports made as aforesaid, your petitioner duly reported to said board that the tangible property included in said special franchise consisted of railroad structures, sub-structures, tracks and the iron thereof, and other fixtures permitted and authorized to be made, laid or placed in, upon, above or under said streets, highways and public places, and the value thereof based upon the costs of reproducing the same, as required by said board.

Your petitioner further shows that thereafter said State board, claiming to act pursuant to the tax law of this State, and
3 claiming and alleging that the said special franchise owned by your petitioner as aforesaid, was subject to assessment in the city of New York, proceeded to fix and determine the valuation thereof, and, as your petitioner is informed and believes, did, on or about the 20th day of March, 1900, fix and determine the valuation of said special franchise to be the sum of two million three hundred and thirty thousand one hundred and forty ($2,330,140) dollars, and did thereupon make the assessment of said special franchise at the sum aforesaid.

That immediately after making said assessment, said State board gave to your petitioner a notice in writing, stating in substance, that such assessment had been made and that the total valuation of said special franchise was two million three hundred and thirty thousand one hundred and forty ($2,330,140) dollars, and that said State board would meet at its office in the city of Albany on the 10th day of April, 1900, at 10.00 o'clock a. m., to hear and determine any complaint concerning such assessment.

That pursuant to such notice, and at the time and place therein stated, your petitioner attended before said board;

That your petitioner, upon said hearing requested to be informed by said board the amount which said board had determined to be the valuation of the tangible property of your petitioner, constructed in, upon, under or above the streets, included in the assessment of said special franchise, and the amount fixed and determined by said State board to be the valuation of the franchise, rights and permissions, to construct, maintain and operate such railroads upon said streets, highways and public places, as aforesaid, but that said

State board refused to give your petitioner such information,
4 and also refused to state or to inform your petitioner the rule or method adopted and applied in ascertaining and determining the said valuation. That your petitioner thereupon complained of said assessment and filed with said State board a written statement under oath, specifying the grounds of its complaint.

That your petitioner complained that said assessment was illegal, and specified, among the grounds of such illegality, in substance that all the provisions of the statute known as chapter 712 of the Laws of 1899, purporting to authorize the said State board to make an assessment of the special franchise of your petitioner were unconstitutional and void, and that the said State board had no jurisdiction, right or authority to make such assessment, and the said act does not prescribe any definite method of valuation and was so vague and indefinite that it cannot be administered by the taxing officers or enforced by the courts, and that statute did not provide any definite method or rule by which the said State board could value the franchise, rights or permissions to construct, operate and maintain the railroad of your petitioner included in its special franchise. The said assessment impaired the obligation of the contract by which said special franchise was acquired and is now owned and possessed and operated by your petitioner and violates, in this respect, the Federal and State constitutions. That said assessment was erroneous by reason of over-valuation and that the extent of such over-valuation was two million three hundred and thirty thousand one hundred and forty ($2,330,140) dollars. That said assessment had been made at a higher proportionate valuation than the assessment of other special franchises by the same officers,
5 and that it had been made at a higher proportionate valuation than the assessment of other real estate in the city of New York, and also at a higher proportionate valuation than other real estate throughout the State of New York.

Your petitioner further shows, that thereafter and on or about the 30th day of April, 1900, the said State board, still claiming to act pursuant to tax law of the State, and that the railroad of your petitioner and the franchise, rights and permissions to construct, maintain and operate the same were subject to assessment in the city of New York, finally determined the valuation of said special franchise to be the sum of one million nine hundred and seventy-nine thousand two hundred and seventy-six ($1,979,276) dollars, and on or about April 30th, 1900, filed with the department of taxes and assessments in the city of New York, a written statement of such valuation, as finally fixed and determined by said State board and duly verified by the secretary thereof; and at or about the same time gave notice in writing to your petitioner that such written statement had been filed with the department of taxes and assessments in the city of New York.

Your deponent further shows that by the provisions of the Greater New York charter, the commissioners of taxes and assessments of the city of New York constitute the board of taxes and assessments for said city and also are the department of taxes and

assessments in the city of New York, and were required by law after the 30th day of April in each year to prepare assessment rolls for the several parts of said city, containing valuations of real and personal property and to certify and deliver said assessment rolls to the municipal assembly of said city on the first Monday of July in each year. That said commissioners of taxes and assessments since the 30th day of April last, prepared the assessment rolls of said
6 real and personal property of the several parts of said city for the year 1900, and entered thereon before the final review or certification of such rolls by them, the valuation of said special franchise of your petitioner as so fixed by the said State board as aforesaid, and having annexed thereto their certificate that the said rolls were correct and in accordance with the entries in the several books of record in the said department, duly verified the same and delivered the said assessment rolls to the municipal assembly of said city, as required by law, on the first Monday of July, 1900.

Your petitioner further shows upon information and belief, that the said State board in making the assessment aforesaid of said special franchise, fixed and determined the value thereof at a sum equal to the full and entire value thereof.

That the tax law of the State defines, declares and makes special franchise for the purpose of assessment and taxation land, real estate or real property.

That in the city of New York no real estate or real property is assessed at its full value, but that all land, real estate and real property in said city, as elsewhere in the State, is assessed at a valuation equal to about sixty per cent. of its full value. That it is the official duty of the said State board to investigate and examine the methods of assessment throughout the State and to furnish to local assessors information to aid them in making assessments to real and personal property, and said State board and each of its members well
7 knew in making the assessment of said special franchise at its full value that land and real estate within the State, and especially within the city of New York, was assessed at less than its full value, and notwithstanding such knowledge and information and well knowing that to assess the special franchise, as aforesaid, of your petitioner at its full value would be to assess it at a higher proportionate valuation than other real estate in said city, made the assessment aforesaid.

Your petitioner further shows that, claiming to be aggrieved by said assessment and alleging that it will be injured thereby, it specifies:

First. That said assessment is illegal in that said State board had no jurisdiction or authority to make such assessment for the reason that the statute, namely, chapter 712 of the Laws of 1899, under and pursuant to which said State board claims the power and authority to act in the matter, and to fix and determine the valuation of said special franchise for the purpose of assessment and taxation, is in violation of section 2 of article 10 of the constitution, and also with

the provisions of the Constitution of the United States, and is void, and impairs the obligations of the contract by which said special franchise was acquired and is now held by your petitioner.

That said assessment is also illegal for the reason that said State board refused to inform your petitioner of the valuation fixed and determined by it of the tangible property included in said special franchise, or of the rule or method adopted and applied by said State board in fixing and determining the valuation of the franchise, rights and permissions to construct, maintain and operate said railroad upon said streets, highways and public places as aforesaid, and that by such refusal your petitioner was deprived of such a hearing as it was entitled to by the constitution of the State before a final assessment could be made against it.

Second. That said assessment is erroneous by reason of over-valuation, and the extent of such over-valuation is one million nine hundred and seventy-nine thousand two hundred and seventy-six ($1,979,276) dollars.

Third. That said assessment is unequal in that it has been made at a higher proportionate valuation than the assessment of other land and real estate in the city of New York, and of other land and real estate in the State of New York outside of said city, and your petitioner specifies all the real estate in the city of New York and each and every piece and parcel thereof upon the assessment rolls of said city as instances in which such inequality exists, and the extent thereof, and will give testimony of such inequality upon the hearing of this proceeding.

Your petitioner further shows that fifteen days have not elapsed since the final completion and filing of the assessment roll in said city of New York.

Wherefore, your petitioner prays that a writ of certiorari may be allowed and issue out of this court, directed to the said State Board of Tax Commissioners, commanding them to certify to this court:

1. All and singular the proceedings herein referred to and had by the said State Board of Tax Commissioners relating to said valuation and assessment, with the dates thereof respectively, together with that part of the record relating to the same.

8

2. All and singular the papers submitted by your petitioner and filed with said State Board of Tax Commissioners.

3. Any other evidence or information, if any, before said State board or considered by it in arriving at the decision aforesaid, and if there was no such evidence or information a statement to that effect.

4. A statement of the reasons for arriving at the valuation and assessment as aforesaid, and of the method adopted by said State Board of Tax Commissioners in arriving at the same, and a statement showing under what law, or by virtue of what power or authority, or claim to authority, upon what evidence and by what method, basis or theory said valuation and assessment was made.

5. Any and all documents, records and papers, if any such there be, not embraced in the above specifications relating to and concern-

ing the valuation and assessment aforesaid, and a statement of any other matters material to the determination of the application of said petitioner, to the end that the said determination and proceedings of the said State Board of Tax Commissioners in the premises may be reviewed and corrected as shall be in accordance with the law and facts in this matter, and, further, that your petitioner may have herein such other and further relief as to this court may seem to be just.

Dated New York, July 3d, 1900.

THE TWENTY-THIRD STREET RAILWAY COMPANY,
By D. B. HASBROUCK, *Vice-President.*

HENRY A. ROBINSON,
Attorney for the Petitioner, 621 *Broadway, New York.*

10 CITY AND COUNTY OF NEW YORK, *ss:*

D. B. Hasbrouck, being duly sworn, says that he is the vice-president of the Twenty-third Street Railway Company, the petitioner above named; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated to be alleged on information and belief, and as to those matters he believes it to be true. That the reason why such petition is not verified by the petitioner is, that the petitioner is a corporation. That deponent derives his knowledge of the facts therein set forth from the employees, agents and officers of the said petitioner and from information acquired by him in the performance of his duties.

D. B. HASBROUCK.

Sworn to before me this 3d day of July, 1900.
DAN'L W. PATTERSON,
Notary Public, New York County.

11 Supreme Court of the State of New York.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE Twenty-third Street Railway Company
against
THE STATE BOARD OF TAX COMMISSIONERS OF THE STATE of New York.
} Order.

Upon reading the petition of the Twenty-third Street Railway Company, duly verified on the 3d day of July, 1900, and it appearing therefrom that there are proper grounds for the granting of a writ of certiorari as therein prayed for, addressed to the State Board of Tax Commissioners, upon motion of Henry A. Robinson, attorney for said petitioner, it is

Ordered, that the prayer of said petitioner be granted, and that a writ of certiorari issue out of and under the seal of this court to the State Board of Tax Commissioners of the State of New York, commanding said board to certify and return to this court, at a special term thereof, to be held at the court house in the city of Albany, State of New York, on the second Saturday (13th) of October, 1900, at the opening of the court on that day:

1. All and singular the proceedings herein referred to and had by the said State Board of Tax Commissioners relating to said valuation and assessment, with the dates thereof respectively, together with that part of the record relating to the same.

2. All and singular the papers submitted by your petitioner and filed with said State Board of Tax Commissioners.

12 3. Any other evidence or information, if any, before said State board or considered by it in arriving at the decision aforesaid, and if there was no such evidence or information, a statement to that effect.

4. A statement of the reasons for arriving at the valuation and assessment as aforesaid, and of the method adopted by said State Board of Tax Commissioners in arriving at the same, and a statement showing under what law, or by virtue of what power or authority or claim to authority, upon what evidence and by what method, basis or theory said valuation and assessment was made.

5. Any and all documents, records and papers, if any such there be, not embraced in the above specifications relating to and concerning the valuation and assessment aforesaid, and a statement of any other matters material to the determination of the application of said petitioner, to the end that the said determination and proceedings of the said State Board of Tax Commissioners in the premises may be reviewed and corrected as shall be in accordance with the law and facts in this matter; and, further, that the petitioner may have herein such other and further relief as to the court may seem to be just.

That a copy of said return be served upon Henry A. Robinson, Esq., the petitioner's attorney, at his office, No. 621 Broadway, in the city of New York, on or before September 1st, 1900.

I hereby dispense with the giving of any notice of the application for a writ of certiorari in this matter.

Dated July 5th, 1900.

D. CADY HERRICK,
Justice Supreme Court.

13 *Certiorari.*

The People of the State of New York to the State Board of Tax Commissioners of the State of New York, Greeting:

Whereas, we have been informed by the petition of the Twenty-third Street Railway Company that it is a corporation duly created and existing by and under the laws of the State of New York,

and is located and has its principal office in the city of New York. That the State Board of Tax Commissioners heretofore fixed and determined the valuation of the special franchise of the said petitioner in and for the city of New York, for the year 1900, at the sum of one million nine hundred and seventy-nine thousand two hundred and seventy-six ($1,979,276) dollars, and that said valuation and assessment has been certified by your board to the department of taxes and assessment- of the city of New York, and that such valuation has been entered by the said board of taxes and assessments of the city of New York in the assessment rolls for said city, and has become a part thereof, and that fifteen days have not elapsed since the final revision and certification of said assessment rolls by said department of taxes and assessments in said city.

And we being willing for certain causes to be certified of the proceedings, decisions and actions had by and before your said board in the said matter of the valuation and assessment of said special franchise of the petitioner in the city of New York, as aforesaid;

Do hereby command you that you certify and return to the special term of our supreme court of the State of New York,
14 at the county court house in the city of Albany, State of New York on the second Saturday (13th) of October, 1900, at the opening of the court on that day, together with this writ, the following matters and facts:

1. All and singular the proceedings herein referred to and had by the said State Board of Tax Commissioners relating to said valuation and assessment, with the dates thereof respectively, together with that part of the record relating to the same.

2. All and singular the papers submitted by your petitioner and filed with said State Board of Tax Commissioners.

3. Any other evidence or information, if any, before said State board or considered by it in arriving at the decision aforesaid, and if there was no such evidence or information, a statement to that effect.

4. A statement of the reasons for arriving at the valuation and assessment as aforesaid, and of the method adopted by said State Board of Tax Commissioners in arriving at the same, and a statement showing under what law, or by virtue of what power or authority or claim to authority, upon what evidence and by what method, basis or theory said valuation and assessment was made.

5. Any and all documents, records and papers, if any such there be, not embraced in the above specifications relating to and concerning the valuation and assessment aforesaid, and a statement of any other matters material to the determination of the application of said petitioner, to the end that the said determination and proceedings of the said State Board of Tax Commissioners in the premises may be reviewed and corrected as shall be in accordance with
15 the law and facts in this matter, and, further, that the petitioner may have herein such other and further relief as to the court may seem to be just.

To the end that the proceedings, decisions and actions had by said

State Board of Tax Commissioners in the matter of the valuation and assessment of said special franchise of said petitioner may be reviewed and corrected on the merits by our said court, and that we may further cause to be done thereupon what of right shall be fit to be done.

That a copy of said return be served upon Henry A. Robinson, Esq., the relator's attorney, at his office, No. 621 Broadway, in the city of New York, on or before September 1st, 1900.

Witness the Honorable D. Cady Herrick, one of the justices of said supreme court in and for the third judicial department, at the county court house, in the city of Albany, N. Y., on the 5th day of July, 1900.

By the court.

[L. S.] P. E. McCABE, *Clerk.*

Allowed.

D. CADY HERRICK,
Justice Supreme Court.

HENRY A. ROBINSON,
Attorney for Relator, 621 Broadway, New York.

16 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The Twenty-third Street Railway Company *against* THE STATE BOARD OF TAX COMMISSIONERS. } Return.

To the supreme court of the State of New York:

George E. Priest, J. Edgar Leaycraft and Lester F. Stearns, constituting the State board of tax commissioners of the State of New York, respectfully return to the writ of certiorari issued out of this court on the 5th day of July, 1900, as follows:

I.

This return, except in so far as it is otherwise stated, or where the matters herein returned are matters of record, or statements of fact as such, is made upon information and belief.

II.

All of the proceedings required by statute for the purpose of making and certifying the valuation aforesaid were had before said board, and done and performed in compliance with the statute in such case made and provided, namely, the provisions of chapter 712 of the Laws of 1899, and the amendment thereto.

III.

The State Board of Tax Commissioners was and is authorized by law to make the valuation and assessment complained of, and in the

manner and form as made by it, and the statute under which
17 the said valuations were made is in accordance with the constitution and valid and binding upon the relator, and all the acts done and performed by said State Board of Tax Commissioners, as set forth in the petition herein, were in accordance with law and valid under the constitution and laws of the State of New York and of the United States.

IV.

Your respondents further return that heretofore and on the 30th day of October, 1899, your relator filed with the board a report, verified October 30th, 1899, by Charles E. Warren, its secretary, and on January 3d, 1900, said relator filed with the board a supplemental report, verified December 29th, 1899, by said Charles E. Warren, and on January 24th, 1900, said relator filed with the board a further supplemental report, verified January 22d, 1900, by said Charles E. Warren. All of which said reports, papers and documents, together with the complaint filed by the relator at the time of the hearing hereinafter referred to and the request, complaint and affidavit attached to and forming a part of the return heretofore made in the Metropolitan Street Railway Company proceeding, which is hereby made a part of this return as if set out at length, were before said board at the time of fixing the valuation of the special franchise of the relator. Copies of said reports and complaint of this relator filed as aforesaid, are hereto annexed and marked Exhibits "A," "B," "C" and "D."

V.

A notice in writing was duly given to the relator that the said State Board of Tax Commissioners would meet at its office in the city of Albany on the 10th day of April, 1900, to hear and determine any complaint concerning said assessment. At the time fixed
18 in said notice or to which the matter was adjourned the relator appeared and filed certain papers and was heard by counsel. Copies of said papers being hereto attached as aforesaid.

VI.

That the petitioner is in nowise aggrieved by the action of the State Board of Tax Commissioners in the premises and that the sum fixed by it as the valuation of its special franchise in the borough of Manhattan, city of New York, is neither erroneous nor illegal, nor is the same an over-valuation of such special franchise in said borough.

That the rights, permission and franchises set out in the petition of the relator constitute a special franchise as the same is defined by the tax law, upon which the relator is subject to a special franchise tax, and do not constitute separate and distinct special franchises so that the valuation is required to be fixed separate and apart from each other.

VII.

That your respondents have not knowledge or information sufficient to form a belief as to the exact percentage of the assessment by the local authorities of the said borough of Manhattan, city of New York, of other real property in said borough for the year 1900, and that your respondents have decided the sum of $1,979,276 to be the full and true value of the special franchises of the relator in the said borough and valued the same for assessment at that sum.

VIII.

Your respondents further allege and return that at and previous to the time of making such assessment, they had before them certain facts and information other than those communicated to them
19 on behalf of the relator. That at and previous to the time when the assessment and valuation of the special franchise of the relator was made by your respondents, they had made inquiry, examination and investigation as to the value of the special franchises of the relator in said borough of Manhattan, city of New York. That such inquiry, examination and investigation was made by and on behalf of this board through its agents and employees, who had obtained knowledge and information and formed opinion as to the value of the special franchise of the relator assessed and in connection therewith of the value of the property of the relator, real and personal, in said borough, it being impracticable, by reason of the large number of special franchises assessed by your respondents for them to make personal examination of the property of this relator; and from such inquiry, examination and investigation, together with the papers and documents produced before it, it decided the value of the special franchise of the relator to be the full sum of $1,979,276 and it fixed the value of such special franchise for the purpose of assessment at the said sum of $1,979,276 which your respondents believe to be a just and true valuation and which they decided to be the sum at which the said special franchise of the relator was properly assessable for the year 1900, after hearing the relator and after consideration of the matters presented by it as grounds for reduction.

IX.

That your respondents allege and return that the petitioner was allowed in all respects the hearing provided for and contemplated by section 44 of article 2 of the tax law and alleges that the said relator had a full and fair hearing by its counsel orally and submitted and presented to the board all documents and papers desired to be submitted by it.

20 X.

That the facts pertinent and material, to show the value of the property assessed on the roll which were considered by your respondents and the grounds for the valuation of such special franchise by

them, included the value of the real estate of such corporation situate in the streets, highways and public places in said borough of Manhattan, city of New York, aside from and irrespective of the use and right to use such streets, highways and public places, together with the value of the use and the right to use said streets, highways and public places of said borough by the relator, as such value has been fixed and determined upon the evidence, papers and documents before said board; which papers and documents give among other things the cost of the property, the income therefrom and other facts going to show the value thereof; and from examination, investigation and inquiry made by and on behalf of the said board as to the value of said property. That in so assessing such special franchises and in arriving at the valuation thereof, your respondents have not included in such assessment and valuation any property except such as is situate in, above, upon, or running through the public streets and public places of said borough, including the franchises, rights, authority or permission to construct, operate and maintain its foundations, roadbed, substructures and superstructures, with their appliances in, above, upon, or through said streets and public places; nor have they included the value of the right to be or the franchise to be a corporation; nor have they included the value of the good-will of the business carried on by it; nor have they included the value of any property other than that
21 defined as a special franchise by subdivision 3 of section 2 of the tax law. That such assessment as made of such special franchises includes the value of the tangible and intangible property in said streets, and has been arrived at upon consideration of all the facts and circumstances affecting the value of said property, including the use or right to use said streets and public places, which your respondents have been able to ascertain.

XI.

Your respondents further return that they do not admit any of the allegations in the petition except so far as the same are shown to be true by this return and the papers thereto annexed and referred to and forming a part thereof.

In witness whereof, the undersigned, chairman of the State Board of Tax Commissioners, has hereunto set his hand this sixteenth day of April, 1901.

GEO. E. PRIEST, *Chairman.*

STATE OF NEW YORK, }
County of Albany, } *ss.:*

George E. Priest, being duly sworn, deposes and says: That he is chairman of the State Board of Tax Commissioners; that he has read the foregoing return and knows the contents thereof; that the same is true to the knowledge of deponent, except as to those matters therein alleged to be stated on information and belief and as to those matters he believes it to be true.

GEO. E. PRIEST.

Subscribed and sworn to before me this sixteenth day of April, 1901.

MILLICENT FELLOWS,
Notary Public, Albany Co.

22 "EXHIBIT A."

Report of the Twenty-third Street Railway Company to the State Board of Tax Commissioners of the State of New York for the Year Ending June 30, 1899.

Office of the State Board of Tax Commissioners.

ALBANY, *October 1st*, 1899.

SIR: The following forms, prepared in conformity with the requirements of law, are forwarded you for use in preparing the report of your company required by chapter 712, Laws 1899, a copy of which is enclosed herewith.

It is requested that you complete and forward such report within thirty days, as required by that act.

Very respectfully, STATE BOARD OF TAX COMMISSIONERS.

Extract from Law Relating to Taxation of Special Franchises.

SECTION 1. Subdivision three of section two of the tax law is hereby amended to read as follows:

3. The terms "land," "real estate," and "real property," as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under, or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, under ground or elevated railroads,
23 including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through streets, highways or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, au-

thority or permission to construct, maintain, or operate, in, under above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the State. A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a "special franchise." A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.

24 SCHEDULE A.

Title of company—Twenty-third Street Railway Co.
General offices at 621 Broadway, New York city.
Date of close of fiscal year June 30th.
For information concerning this report address Charles E. Warren, secretary.

Officers of the company, with address:

President—H. H. Vreeland	621 Broadway.
Vice-president—D. B. Hasbrouck	"
Secretary—Charles E. Warren	"
Treasurer—H. S. Beattie	"
Supt.—H. A. Newell, Jr.	"

SCHEDULE B.

Description of special franchise, showing streets, highways, or public places possessed or rights enjoyed and in what village, tax district or districts same is located, and statement of maps accompanying this report.

Twenty-third Street railway, located in borough of Manhattan, city of New York—see printed franchise data, and map attached.

This report should be accompanied by maps showing the location and extent of all property subject to taxation as a "special franchise."

25 SCHEDULE C.

Copy of special law, grant, ordinance, or contract or reference to general law under which "special franchise is held, possessed, or enjoyed and statement of any condition, obligation, or burden imposed upon such special franchise or under which the same is enjoyed."

Twenty-third Street Railway Company.

Franchises:

Laws of 1869, chap. 823.
Laws of 1872, chap. 521.
Laws of 1873, chap. 100.

(NOTE.)—There was paid the city on behalf of this company $150,000, on purchase of the franchise at public auction, held by the commissioners of the sinking fund, June 10th, 1869.

SCHEDULE D.

Statement of Assets and Liabilities, June 30, 1899.

Assets.	Amount.	Liabilities.	Amount.
Cost of real estate and improvements	$1,754,270 73	Capital stock	$600,000 00
Cost of equipment	318,726 46	Funded debt	400,000 00
Stock and bonds of other companies		Accounts and bills payable	
Material and supplies		Interest on funded debt due and accrued	
Accounts and bills receivable		Rentals due and accrued	
Cash on hand		Dividends unpaid	
		Due lessee Co. for additions and betterments	1,011,932 52
Profit and loss		Profit and loss	61,064 67
Total	$2,072,997 19	Total	$2,072,997 19

SCHEDULE E.

Capital Stock.

	Number shares.	Total par value.	Dividends declared during year.		Market value during year.		
			Rate.	Amount.	Highest.	Lowest.	Present.
Common issued	6,000	$600,000	18%	$108,000	390	310	390
Preferred issued							
Total	6,000	$600,000	18%	$108,000			

SCHEDULE F.

Funded Debt.

Designation of lien.	Date.	Maturity.	Amount outstanding.	Interest.		Market value during year.		
				Rate.	When payable.	Highest.	Lowest.	Present.
1st mortgage	Oct. 11, 1893	15 years	$250,000	6%	Jan. and July	No sales		125
Debentures	Jan. 1, 1896	20 years	150,000	5%	Jan. and July	106	102	102

28 SCHEDULE G.

Statement of Receipts and Disbursements for Year Ending June 30, 1899.

Receipts.

	Amount.
From actual operation	
Interest and dividends	
Rentals	$108,000.00
Other sources	22,500.00
Sales of stocks and bonds	
Temporary loans	
Deficit	
Total	$130,500.00

Disbursements.

		Amount.
Salaries of general officers and clerks		
Law expenses		
Other general expenses		
Maintenance and reconstruction or new construction paid from earnings		
Maintenance, reconstruction or new construction paid from other sources		
Rentals		$22,500.00
Taxes on capital stock and earnings paid by lessee	$8,751.86	
Taxes on property in this State and car license fees paid by lessee	9,168.15	
Taxes on property in other States		
Dividends paid 18% common stock		108,000.00
Dividends paid —% preferred stock		
Surplus		

29

SCHEDULE H.

Statement in Detail of Rentals Paid.

Name of lessor.	Annual rental paid by lessee.	Portion used for payment of interest on debt of lessor.	Portion used for payment of dividends on capital stock of lessor.
Total amount of annual rental			

30

SCHEDULE J.

Statement in Detail of Rentals Received.

Name of lessee.	The annual amount.	
Metropolitan Street Railway Co. pays 18% on $600,000 capital stock.....	$108,000	
And interest on $400,000 funded debt...	22,500	

SCHEDULE K.

Statement of Cost, Value on Basis of Reproduction

* Name of tax district wherein located. (Give village, if one, and county.)	Cost of tangible real property included in "special franchise."	Value of tangible real property included in "special franchise" on basis of cost of reproduction.	Cost of real property not included in "special franchise."
Manhattan borough, New York city.....	Don't know.	$750,000	Don't know.
Total.....			

* Name of each tax district in which assessments are made for real estate.

Twenty-third Street Railway Company:

This road was constructed prior to 1875, as I am advised.

I have no means of ascertaining its original cost. I assume that such cost is represented by so much of its stock and bonds now outstanding as were not expended for personal property which has been destroyed by use upon the road.

And Assessment of Real Estate in Each Tax District.

Value of real property not included in "special franchise" on basis of cost of reproduction.	Last assessment of real property included in "special franchise." *	Last assessment of real property not in connection with "special franchise." *	Give total number of miles of tracks and sidings,—or wires, cables or other conductors,—or of main pipes and number of service pipes,—as the case may be, in, upon, under or over streets and highways in each tax district.
$150,000	100,000	348,000	4.12 miles of single track owned. Electric..... ..... 3.84 Horse..... ..... .28

* Give facts in this column when such property has been separately assessed.

32 SCHEDULE L.

Detailed Statement of Shares of Stock Actually Owned in Other Corporations which are Taxable on Their Capital Stock and All Other Non-taxable Securities Owned.

Description.	Amount.
None.	
Total	
Value of tangible personal property	$145,112
Total assessment of personal property	200,000

SCHEDULE M.

Details of Roads Owned and Leased.

Name of road.	From	To	Miles owned.	Miles leased.
23d Street railway	23d street and N. river	23d street and E. river	3 84	Electric
34th Street branch	34th street and E. river	23d street and 2d avenue	.28	Horse.
Bleecker Street and Fulton Ferry railroad	23d street and 11th avenue	Fulton ferry, E. river		10.76

This schedule is applicable only to railroad corporations.

34 SCHEDULE N.

Show changes, if any, between June 30, 1899, and October 1, 1899, in real estate or otherwise, affecting the purpose of this report.

The law requires that every report made under this section shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the association or corporation, or one of the persons or one of the members of the co-partnership making the same.

STATE OF NEW YORK, } ss.:
County of New York, }

Charles E. Warren, secretary of the Twenty-third Street Railway Company, being duly sworn, deposes and says that the foregoing statements have been compiled from the books and records of this company, and after careful examination of the same, declares them to be a true, full and correct statement of the property of said company and the value thereof at the close of the year ending June 30, 1899, as well as of its financial condition and affairs on the said date, and a like true, full and correct statement of the real property of said company on the first day of October, 1899, to the best of my knowledge and belief.

[L. S.] CHARLES E. WARREN, *Sec'y.*

Subscribed and sworn to before me, this 27th day of October, 1899.

S. A. EMANUEL,
Notary Public, New York County, N. Y.

35 "EXHIBIT B."

Form 5.

Tax district —.

Surface
Street railroads.
Animal power.
Cable conduit.
Conduit electric.
Electric overhead.
Surface steam.
Other powers.

Supplemental Report of the Twenty-third Street Railway Company of Tangible Real Property Located in, upon, under, or above Streets, Highways, and Public Places.

To Metrop. system:

Pursuant to the provisions of section 43, chapter 712, Laws of 1899, you are requested to make and file a supplemental report of the matters contained in the within blank, and return to this office on or before —— —.

Yours very truly,

STATE BOARD OF TAX COMMISSIONERS.

Form 5. *Overhead System.*

	Single track.			Double track.			
	Miles.	Age.	Miles constructed since last tax assessment.	Miles.	Age.	Miles constructed since last tax assessment.	
Bracket cons							
Wooden poles.....							
Bracket cons							
Iron poles.....							
Span wire cons							
Wooden poles							
Span wire cons							
Iron poles.....							
Total cost of property described above erected complete.....							$
Total present value based on cost of production.....							$

Conductors.

Conductors not in subways (exclusive of trolley wire).			Insulated conductors in subways.			Third rail system conductor rail.		
Miles.	Size.	Age.	Miles.	Size.	Age.	Weight per yard.	Section.	Age.
			5.08 3.96	1,000,000 M. 500,000 M.				

Total cost of property described above erected complete—cannot give—have no means of ascertaining	$
Total present value based on cost of reproduction	$27,676

Surface Street Railroads.

Form 5. *Track.*

Motive power.*	Miles measured as single track.	Rails.			Kind of paving.†	Miles laid since last tax assessment.	
		Weight per yard.	Section Girder, tee, or tram.	When laid.			
Conduit electric	3.84	91 & 109 lbs.	Girder	1896 & 1898.	Stone		
Horse	.14	47 lbs.	Tram.	Before 1894.	"		
"	.14	"	"	"	"		
Total original cost of property described above laid complete—cannot give—have no means of ascertaining							
Total present value based on cost of reproduction							$529,047.00

*When motive power is electricity, state whether conduit electric or overhead electric, and, if both systems are operated, report each system separately.
†If not paved, state kind of ballast and number of cubic yards per mile.

Miles of subway. *	Number of ducts. *	Type of duct.	Kind of paving.	Number of manholes.	Built since last tax assessment.		
					Miles of subway.	Number of manholes.	
	12						
.61	36	Cement and tile	Stone	16			
.34	40	" "	"	9			
.21	54	" "	"	6			
.28	48	" "	"	7			
	22						
.23	20	" "	"	6			
.36	6	Cement	"	9			
Total original cost of property described above built complete—cannot give—have no means of ascertaining.							
Total present value based on cost of reproduction							$53,623 34

*Give separately miles of subways containing respectively 1, 2, 3, 4 and more ducts.

40 STATE OF NEW YORK, } ss:
County of New York, }

Charles E. Warren, secretary of the Twenty-third Street Railway Company, being duly sworn, deposes and says that the foregoing statements have been compiled from the books and records of this company, and from facts in possession of its officers and employees, and after careful examination of the same, declares them to be a true, full and correct statement of the property of said company and the value thereof as to all the matters herein set forth, to the best of my knowledge and belief.

CHARLES E. WARREN.

Subscribed and sworn to before me, this 29th day of December, 1899.

DAN. W. PATTERSON,
Notary Public, New York County.

41 "EXHIBIT C."

Form 12.

Supplemental Report of the Twenty-third Street Railway Company to the State Board of Tax Commissioners of the State of New York.

To —— ——:

Pursuant to the provisions of section 43, chapter 712, Laws of 1899, you are requested to make and file a supplemental report of the matters contained in the within blank, and return to this office on or before —— —, 1900.

Yours very truly,
STATE BOARD OF TAX COMMISSIONERS.

(Twenty-third Street.)

Disbursements of Earnings for Year Ending June 30, 1899.

Operating expenses paid from earnings	} Reported by lessee Co.	
Maintenance		
Reconstruction		
New construction (extension) paid from earnings		
(Number of miles of latter —.)		
Total		

Itemize all sums paid in nature of local tax.

Percentage on gross earnings paid to municipality		Paid by lessee comp'y.
No. of cars —, license per car $—.....	$1,500.00	
Real estate, $6,844.05; track, $824.10	7,668.15	
Gross earnings and capital stock (state).....	8,751.86	
Total amount paid for taxes, percentages, licenses, etc., etc.....	$17,920.01	

42 In addition to the above, the Twenty-third Street Railway Co. was assessed $200,000 on the value of its capital stock, upon which the tax was $4,587.42.

A certiorari is pending to review the assessment, and the tax has not as yet been paid.

STATE OF NEW YORK,
County of New York, } ss.:

Charles E. Warren, secretary of the Twenty-third Street Railway Company, being duly sworn, deposes and says that the foregoing statements have been compiled from the books and records of this company, and after careful examination of the same, declare them to be true, to the best of my knowledge and belief.

CHARLES E. WARREN.

Subscribed and sworn to before me, this 22d day of January, 1900.

F. J. MARINELLI,
Notary Public, N. Y. Co.

43 "EXHIBIT D."

To the State Board of Tax Commissioners:

The Twenty-third Street Railway Company hereby complains of the assessment made by the State Board of Tax Commissioners upon the franchise, rights and permission owned by it to construct, maintain and operate a railroad or railroads on the surface of streets in the borough of Manhattan, in the city of New York, and specifies the following respects in which the assessment complained of is incorrect:

First. The said assessment is illegal for the reason that the State Board of Tax Commissioners have no authority in law to assess or to fix and determine the valuation for the purposes of taxation of the franchise, rights or permissions to operate a railroad upon the surface of the streets in the city of New York, in that the statute, viz: chapters 712 of the Laws of 1899, which your petitioner is advised the State Board of Tax Commissioners claim confers upon it the power and authority to make such assessment and fix and determine the valuation of such franchise, rights, and permissions, is in violation of the constitution of the State of New York, and is void.

Second. That the said assessment made by the State Board of Tax Commissioners upon the franchise, rights and permission owned by your petitioner to construct, maintain and operate railroads upon the surface of streets in the city of New York is illegal and void for the reason that the statute of the State, viz., chapter 712 of the Laws of 1899, which the said board of tax commissioners claim confers upon

it the right, power and authority to act in the premises, and
44 to fix and determine the valuation of such franchise, rights and permissions, prescribes no rule for valuation of such franchise, rights and permission, and is for that reason illegal and void.

Third. That the valuation of the franchise, rights and permissions as aforesaid, owned by the Twenty-third Street Railway Company, as fixed and determined by said board of tax commissioners at the sum of two million three hundred and thirty thousand one hundred and forty ($2,330,140) dollars is grossly excessive, and is an over-valuation, and for that reason said assessment fixed and determined by said board is erroneous. That the extent of such over-valuation is ($2,000,000) two million of dollars.

Fourth. That the said assessment and the valuation of the franchise, rights and permissions owned by the Thirty-fourth Street Railroad Company, as fixed and determined by said board, is unequal in that it has been made at a higher proportion of valuation than that of other special franchises of the same character within the city of New York, to wit: at a higher proportionate valuation than the franchise, rights and permissions to construct, maintain and operate railroads on the surface of the streets owned by other railroad corporations in the city of New York.

Fifth. That the said assessment and valuation of the franchise, rights and permissions as aforesaid, owned by the Twenty-third Street Railway Company, as fixed and determined by said board, is unequal in that it has been made at a higher proportionate valuation than the assessment of other special franchises of the same character in the State of New York, to wit: at a higher pro-
45 portionate valuation than the assessment of the franchise, rights and permissions to construct, maintain and operate railroads on the surface of streets owned by other railroad corporations in the State of New York.

Sixth. That the said assessment and said valuation of the franchise, rights and permissions owned by the Twenty-third Street Railway Company, as aforesaid, as fixed and determined by the State Board of Tax Commissioners, is unequal in that it is made at a higher proportionate valuation than the assessment of all other real estate in the city of New York.

Seventh. That the said board of tax commissioners have refused to inform the said corporation the value of the tangible property of said corporation situated in, upon, under or above the streets upon which the said corporation owns the right and franchise to construct, maintain and operate a railroad, fixed and determined by the said commissioners and included in said assessment, and also has refused to inform the said corporation of the value of the franchise, rights and permissions owned and possessed by said corporation to construct, maintain and operate a railroad upon said streets, as fixed and determined by said commissioners.

Eighth. That said corporation has not been given such a hearing

before the commissioners as it is entitled to under the laws and constitution of the State.

Ninth. That the right, privilege and franchise owned and possessed by the Twenty-third Street Railway Company was acquired by it and its grantor under and pursuant to a contract with
46 the State and city of New York, and upon conditions and stipulations in reference thereto, which exempt the said franchise from assessment and taxation by the board of tax commissioners, and the said Twenty-third Street Railway Company claims that its right, franchises and privileges are not taxable.

That said corporation refers to and makes a part of this complaint, all the reports, statements, affidavits and information of every kind furnished by it to the commissioners, and now on file with the said board.

Dated New York, April —, 1900.

TWENTY-THIRD STREET RAILWAY COMPANY,
By CHARLES E. WARREN, *Secretary.*

STATE OF NEW YORK, }
County of New York, } ss:

Charles E. Warren, being duly sworn, deposes and says: That he is the secretary of the Twenty-third Street Railway Company; that the foregoing statement, specifying the respects in which the assessment upon the Twenty-third Street Railway Company is incorrect, is true.

CHARLES E. WARREN.

Sworn to before me this 9th day of April, 1900.

O. L. HOAGLAND,
Notary Public, New York County.

47 (The following are papers filed under Schedule "C" hereinabove, page 25.)

The Twenty-third Street Railway Company.

Franchise Grant Ordinance, with Financial Conditions or Obligations Imposed.

Grant of franchise to run on Twenty-third street.

Chapter 823 of the Laws of 1869.

An act to authorize the construction of a railroad through Twenty-third street, in the city of New York.

Passed May 10th, 1869.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The commissioners of the sinking fund of the city of

New York, are hereby authorized and required within twenty days after the passage of this act to advertise for two weeks, in at least two of the daily papers published in said city, that they will on a certain day and at a certain place to be therein specified, sell at public auction to the highest bidder, the right, privilege and franchise to construct, operate and use a railroad with a double track, and the necessary turnouts and switches for the proper working of the same, through, along and upon Twenty-third street in the city of New York from the North river to the East river. Such sale shall be conducted in the ordinary manner of sales at auction, and the person or corporation who shall offer to pay into the city treasury the largest sum of money for such right, privilege or franchise, shall receive from said commissioners a certificate that he or they are entitled to such grant and are authorized to construct, operate and use the same in accordance with the provisions of this act; such
48 certificate to be issued on the payment within ten days into the city treasury of the amount of the bid, and on the execution of a bond, to the said commissioners in such form and for such an amount as they shall prescribe conditioned that the person or corporation receiving such certificate will within four months finish and complete said road and equip the same with the requisite number of cars and horses, but should he or they be restrained or prevented by any legal proceedings from constructing and completing the same, the time during which they are so restrained, shall not be deemed or taken to be part of the time within which the same is to be completed.

§ 2. The party or corporation receiving such certificate is hereby authorized and empowered to lay, construct and operate a railroad with a double track through and upon Twenty-third street in the city of New York from the North river to the East river, with the necessary connections, turnouts and switches for the proper working of the same.

§ 3. Said railroad shall be constructed on the most approved plan for the construction of city railroads, and with the rail now used upon the street railroads in Philadelphia, commonly called the Philadelphia rail, and shall be run as often as the convenience of passengers may require, and shall be subject to such reasonable rules and regulations in respect thereto as the common council of the city of New York may from time to time by ordinance prescribe, and the said party or corporation are hereby authorized to charge the same rate of fare for the conveyance of passengers on said railroad as is now charged by other city railroads in said city.

§ 4. In the construction, operation or use of such railroad upon the route above designated, should such person or corporation deem it necessary or proper to run upon, intersect or use any por-
49 tion of other railroad tracks now laid upon said street above named, *he* or they are hereby authorized to run upon, intersect and use the same; and in case they cannot agree with the owner or owners thereof respecting the compensation or payment to be made therefor, then the amount of such compensation or payment

shall be ascertained and determined in the manner provided by subdivision six of the twenty-eighth section of the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty. And should any real estate or interest therein be required for the purpose of constructing said railroad as above specified and authorized, for which the said person or corporation shall be unable to agree with the owner or owners for the use or purchase thereof, they may acquire the right to use or title to the same in the manner specified in the fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first sections of the said act of April second, eighteen hundred and fifty, except that in any of the proceedings for any of the purposes authorized by this section, it shall not be necessary that the petition to the supreme court shall make any allegations of or reference to any incorporation, capital stock, surveys, or maps or of the filing of any certificate of location. But in all cases the use of said street for the purposes of said railroad as herein authorized shall be considered a public use consistent with the uses for which the mayor, aldermen and commonalty of said city hold said street. Nothing in this act contained shall authorize or allow the existence of more than two tracks in any part of said street.

§ 5. The legislature may at any time alter, amend or repeal this act.

§ 6. This act shall take effect immediately.

50 *Chapter* 521 *of the Laws of* 1872.

An act to amend an act entitled "An act to authorize the construction of a railroad through Twenty-third street in the city of New York," passed May 10th, 1869, so as to authorize the comptroller of the city of New York to carry into effect the powers conferred by the first section of the above act upon the commissioners of the sinking fund of the city of New York, in relation to the advertising and sale of the franchise for building such railroad to the highest bidder on paying the amount of such bid or giving security for such payment satisfactory to said comptroller, to issue the certificate of title to such grant mentioned in said first section of said act to Sidney A. Yeomans or to his assigns, and granting all the rights, privileges, powers and benefits conferred and prescribed in the second, third and fourth sections of said act to said Sidney A. Yeomans and his assigns, and requiring him or his assigns to finish, complete and equip said road within eight months from the time of receiving such certificate.

Passed May 6, 1872.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The comptroller of the city of New York is hereby authorized and directed, on the payment into the city treasury by

Sidney A. Yeomans, of the sum of one hundred and fifty thousand dollars, that being the amount of his bid, which was accepted and tendered to the commissioners of the sinking fund on the
51 tenth day of June, A. D. eighteen hundred and sixty-nine, or upon the giving of such security for the payment thereof as shall be satisfactory to said comptroller, to issue to said Sidney A. Yeomans, or to whoever the said Sidney A. Yeomans shall assign the same, the certificate required to be issued by the said commissioners of the sinking fund, in and by the provisions of the act of the legislature of the State of New York, entitled "An act to authorize the construction of a railroad through Twenty-third street, in the city of New York," passed May tenth, eighteen hundred and sixty-nine, that he or they and their successors and assigns are entitled to the grant of the rights, privileges and franchises mentioned, described and conferred in and by said act.

§ 2. The said Sidney A. Yeomans and his assigns upon receiving such certificate shall thereby be invested with all the rights, privileges, benefits and franchises that might or could be given, granted or conferred upon him and them by the commissioners of the sinking fund under any and all the provisions of said act or by said act.

§ 3. All the rights, privileges, powers and benefits granted, conferred and prescribed in and by section second, third and fourth of said act, shall inure to the benefit of said Sidney A. Yeomans and his assigns in the same manner, and be of the same effect as if the said commissioners of the sinking fund had received and accepted the tender of said amount and issued the certificate required by said act, provided only that said Sidney A. Yeomans and his assigns should be required to finish, complete and equip said road within eight months from the time of receiving said certificate.

52 § 4. Should said Sidney A. Yeomans or his assigns be restrained or prevented by any legal proceedings from constructing and completing the said road, the time during which they are so restrained shall not be deemed or taken to be a part of the time within which the same is to be completed.

§ 5. This act shall take effect immediately.

53 *Assignment.*

Sidney A. Yeomans
to
Twenty-third Street Railway Company.

Know all men by these presents, that I, Sidney A. Yeomans, of the city of New York, the person named in the act of the legislature of the State of New York, hereinafter mentioned, for and in consideration of the sum of one hundred and thirteen thousand dollars lawful money of the United States of America, to me in hand paid by the Twenty-third Street Railway Company, the receipt of which is hereby acknowledged, have granted, bargained, sold, assigned

transferred and conveyed, and by these presents do grant, bargain, sell, assign, transfer and convey unto the said Twenty-third Street Railway Company, its successors and assigns forever, all my estate, rights, powers, privileges, benefits, franchises and interest conferred upon, owned or possessed by me under or by virtue of an act of the legislature of the State of New York entitled "An act to amend an act entitled 'An act to authorize the construction of a railroad through Twenty-third street, in the city of New York,' passed May 10th, 1869, so as to authorize the comptroller of the city of New York to carry into effect the powers conferred by the first section of the above act upon the commissioners of the sinking fund of the city of New York, in relation to the advertising and sale of the franchise for building such railroad to the highest bidder on paying the amount of such bid, or giving security for such payment satisfactory to said comptroller, to issue the certificate of title to such grant mentioned in said first section of said act to Sidney A.
51 Yeomans, or to his assigns, and granting all the rights, privileges, powers and benefits conferred and prescribed in the second, third and fourth sections of said act to said Sidney A. Yeomans and his assigns, and requiring him or his assigns to finish, complete and equip said road within eight months from the time of receiving such certificate," passed May 6th, 1872.

And also all my estate, rights, powers, privileges, franchises, benefits and interest to which I am, or may be, entitled as purchaser or bidder under or by virtue of an act of said legislature entitled "An act to authorize the construction of a railroad through Twenty-third street, in the city of New York," passed May 10, 1869.

To have and to hold to it, the said Twenty-third Street Railway Company, its successors and assigns forever. And I, the said Sidney A. Yeomans, hereby make, constitute and appoint the said Twenty-third Street Railway Company, my true and lawful attorney, to take all lawful ways and means to obtain from the commissioners of the sinking fund or the comptroller of the city of New York, mentioned in said act, the certificate therein mentioned in my name or otherwise, but for its and its successors' and assigns' use and benefit, and generally to do and perform all and every act, matter or thing that can or may be requisite in or about the premises.

In witness whereof, I, the said Sidney A. Yeomans have hereunto set my hand and seal this eleventh day of July, in the year one thousand eight hundred and seventy-two.

SIDNEY A. YEOMANS. [SEAL.]

Signed, sealed and delivered in the presence of—

J. FRED'K FLANAGAN.

55 CITY AND COUNTY OF NEW YORK, *ss.:*

On this 11th day of July, 1872, before me came Sidney A. Yeomans, to me known to be the individual described in and who executed the foregoing instrument, and acknowledged to me that he executed the same.

RICHD STACPOOLE,
Notary Public.

56 *Certificate of Title to Franchise.*

Whereas, the legislature of the State of New York, on the sixth day of May, 1872, passed an act entitled "An act to amend an act entitled 'An act to authorize the construction of a railroad through Twenty-third street, in the city of New York,' passed May 10th, 1869, so as to authorize the comptroller of the city of New York to carry into effect the powers conferred by the first section of the above act upon the commissioners of the sinking fund of the city of New York, in relation to the advertising and sale of the franchise for building such railroad to the highest bidder on paying the amount of such bid, or giving security for such payment satisfactory to said comptroller, to issue the certificate of title to such grant mentioned in said first section of said act to Sidney A. Yeomans or to his assigns, and granting all the rights, privileges, powers and benefits conferred and prescribed in the second, third and fourth sections of said act to said Sidney A. Yeomans and his assigns, and requiring him or his assigns to finish, complete and equip said road within eight months from the time of receiving such certificate," whereby the comptroller of the city of New York is "authorized and directed, on the payment into the city treasury by Sidney A. Yeomans of the sum of one hundred and fifty thousand dollars, that being the amount of his bid which was accepted and tendered to the commissioners of the sinking fund on the tenth day of June, A. D. eighteen hundred and sixty-nine, or upon the giving of such security for the payment thereof as shall be satisfactory to said comptroller, to issue to said Sidney A. Yeomans, or to whoever the said
57 Sidney A. Yeomans shall assign the same, the certificate required to be issued by the said commissioners of the sinking fund in and by the provisions of the act of the legislature of the State of New York, entitled "An act to authorize the construction of a railroad through Twenty-third street, in the city of New York," passed May tenth, eighteen hundred and sixty-nine; that he or they and their successors and assigns are entitled to the grant of the rights, privileges and franchises mentioned, described and conferred in and by said act;

And whereas, it appears by an instrument of assignment duly filed in the department of finance, that the said Sidney A. Yeomans has this day duly transferred and assigned unto the Twenty-third Street Railway Company, a corporation organized under and in pur-

suance of the general railroad laws of the State of New York, the said certificate and the rights, privileges and franchises described and conferred in said acts:

And whereas, the said Sidney A. Yeomans has this day paid into the city treasury the sum of one hundred and fifty thousand dollars;

Now, therefore, I, Andrew H. Green, comptroller of the city of New York, do, in pursuance of the provisions of the act passed May 6th, 1872, first above mentioned, hereby certify that the said Twenty-third Street Railway Company is entitled to the grant, right, privilege and franchise as mentioned and conferred in and by the aforesaid act, passed on the tenth day of May, 1869, and is authorized to construct, operate and use the same in accordance with the provisions of said act;

58 Provided that the said Twenty-third Street Railway Company shall finish, complete and equip the railroad mentioned in said acts within eight months from the time of receiving this certificate.

In witness whereof, I have hereunto set my hand this eleventh day of July, A. D. one thousand eight hundred and seventy-two.

ANDW. H. GREEN,
Comptroller of the City of New York.

In the presence of—
RICH'D A. STORRS.

59 *Grant of Thirty-fourth Street Extension.*

Chapter 100 of the Laws of 1873.

An act to authorize the Twenty-third Street Railway Company in the city of New York to extend their tracks, and use and operate the same.

Passed March 19, 1873.

The people of the State of New York, represented in senate and assembly, do enact as follows:

SECTION 1. The Twenty-third Street Railway Company is hereby authorized and empowered to lay, construct, use and operate railroad tracks in connection with their present railroad, through and along the Second avenue, with a double track to Twenty-eighth street, thence through and along Twenty-eighth street; with a single track to the First avenue; thence through and along the First avenue, with a single track to Twenty-ninth street; thence through and along said First avenue, with a double track to Thirty-fourth street; also through and along Twenty-ninth street with a single track from said track in the First avenue to the Second avenue; and thence through and along said Second avenue, with a single track to the southerly side of Twenty-eighth street, together with all necessary and proper connections, switches, curves, turnouts, side tracks and turn

tables, for the complete use and operation of their said road and the extensions herein granted; and the said railway company shall remove and dump in the East river, at the most convenient point, the snow on Twenty-ninth and Twenty-eighth streets from First to Second avenues, when the same is of sufficient depth to interfere with the ordinary travel on said street.

60 § 2. The said company is hereby authorized to intersect run upon and use the track of any railroad now laid on said avenue, and in case agreement shall not be made with the owner or owners of such other railroad tracks, in respect to the payment or compensation to be made therefor, or for the use thereof, then the amount of such compensation or payment shall be ascertained and determined in the manner provided by subdivision six of the twenty-eighth section of the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty. And should any real estate or interest thereon be required for the purpose of constructing said railroads so authorized to be extended, for which the said company or its successors shall be unable to agree with the owner or owners for the use or purchase thereof, said company may acquire the right to use or title to the same in the manner specified in the fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth and twenty-first sections of the act entitled "An act to authorize the formation of railroad corporations and to regulate the same," passed April second, eighteen hundred and fifty except that in any of the proceedings for any of the purposes authorized by this act, it shall not be necessary that the petition to the supreme court shall make any allegations of or reference to any incorporation, capital stock, surveys or maps, or of the filing of any certificate of location. But in all cases the use of said streets and avenues for the purposes of said railroads, as herein authorized, shall be considered a public use consistent with the uses for which the mayor, aldermen and commonalty of said city hold said streets and avenues.

61 § 3. In construction, use and operation by the said company of the track and extension authorized by this act, they shall have and exercise the same rights and privileges which are now possessed and exercised under former grants and laws.

§ 4. The said railway company may charge the same fare for the conveyance of passengers over their route as hereby extended as they are now authorized to charge, but shall not be allowed to charge any additional rate of fare for their entire route or any part thereof, because of the extension hereby granted; and cars shall be run on said extension as often as the convenience of passengers shall require.

§ 5. This act shall take effect immediately.

62 At a special term of the supreme court of the State of New York, held in and for the county of Albany, at the court house, in the city of Albany, on the 16th day of April, 1901.

Present: Hon. D. Cady Herrick, justice.

Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* The Twenty-third Street Railway Company

against

THE STATE BOARD OF TAX COMMISSIONERS.

} Order of Reference.

A writ of certiorari having heretofore been duly allowed in each of the above-entitled proceedings, pursuant to the provisions of article XI of the tax law as amended by chapter 712 of the Laws of 1899, upon the verified petitions of the above-named relators to review the action of the said Board of Tax Commissioners in assessing the several special franchises of the said relators; proof of due service on the said commissioners of the said writs, together
63 with copies of the petitions on which they were granted and of the orders directing the said writs to issue having been made; the said Board of Tax Commissioners having made a return to said writs; further proceedings herein having been from time to time adjourned by stipulation between the attorneys for the respective parties; no hearing having been had upon the said returns; the said relators, by their attorney, Mr. Henry A. Robinson, and Mr. Chas. F. Brown, of counsel, having made application to this court for an order appointing a referee to take such evidence herein as the court may direct and to report the same to this court with his findings of fact and conclusions of law; the attorney-general of the State of New York, on behalf of the said State Board of Tax Commissioners, having appeared and consented to such reference and to the granting and entry of an order of reference;

Now, on the said petition, order, writ and return and on all the proceedings heretofore had herein, on motion of the said attorneys for the relators and the attorney-general appearing and making no objection thereto;

It is ordered that it be and it hereby is referred to Hon. Robert Earl, residing at Herkimer, county of Herkimer, in the State of New York, to take and report to this court, with all convenient speed, such evidence upon the several issues of fact raised by the said petition, writ and return as may be adduced before him by either of the parties hereto, with his findings of fact and conclusions of law.

It is further ordered that the hearings under this order be had at such times and places as the said referee may direct; that the said referee shall have power to adjourn said hearing from time
64 to time as justice may require and to compel the attendance of witnesses and the production of papers.

D. CADY HERRICK,
Jus. Sup. Ct.

65–187 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* TWENTY-third Street Railroad Company
against
THE STATE BOARD OF TAX COMMISSIONERS. } No. 2.

The proceedings in the above-entitled matter were had in the assembly parlor at the capitol in the city of Albany, N. Y., on Friday August 2, 1901, before Hon. Robert Earl, referee, as follows:

Appearances.

For the plaintiff: David B. Hill, Charles F. Brown, Frank H. Platt, and Wm. H. Page, Jr.

For the defendants: Deputy Attorney-General Henry B. Coman and J. N. Fiero.

It is *stipulated* that the referee's oath be and hereby is waived.

It is hereby *stipulated* that the testimony and proceedings in the case entitled *The People of the State of New York ex rel. The Metropolitan Street Railway Company* against *The State Board of Tax Commissioners* are considered in evidence in this case in so far as the same are applicable.

188–628 (This portion of the record is identical with similar portions, pages 188–628 inclusive of the record in the proceeding entitled *The People of the State of New York ex rel. The Metropolitan Street Railway Company* against *The State Board of Tax Commissioners*, which is presented to the court simultaneously with this proceeding and is hereby referred to and made part of this record with the same force and effect as if herein set forth at length.)

Plaintiff's counsel offer in evidence a map showing the special franchises owned by the relator company on January 8, 1900.

Received and marked "23d Street Company, Exhibit No. 1, August 2, 1901. J. M. R."

It is hereby *stipulated* that plaintiff's franchises were acquired under chapter 823 of the Laws of 1869, entitled "An act to authorize the construction of a railroad through Twenty-third street in the city of New York," and the act amendatory thereof, being chapter 521 of the Laws of 1872, as well as under chapter 100 of the Laws of 1873, entitled "An act to authorize the Twenty-third Street Railway Company in the city of New York to extend their tracks, and use and operate the same."

Plaintiff's counsel offer in evidence copies of the above-mentioned acts.

Received and marked "23rd Street Co. Exhibits, Nos. 2, 3 and 4, August 2, 1901, J. M. R."

It is hereby *stipulated* that true and correct copies of the same are annexed to the return.

Plaintiff's counsel offer in evidence the assignment of Sidney A. Yeoman to the Twenty-third Street Railway Company.

Received and marked "23rd Street Railway Company Exhibit No. 5, August 2, 1902, J. M. R."

It is hereby *stipulated* that a true and correct copy of the same is annexed to the return.

Plaintiff's counsel offer in evidence the original receipt signed by Andrew H. Green, comptroller of the city of New York, showing the payment of $150,000, which was the sum paid on the sale at public auction of the right to operate a road through Twenty-third street.

Received and marked "23rd Street Company, Exhibit No. 6, August 2, 1901, J. M. R."

It is hereby *stipulated* that a true and correct copy of the same is annexed to the return.

629 Plaintiff's counsel offer in evidence the lease of the Bleecker Street and Fulton Ferry Railroad Company to the Twenty-third Street Railway Company. In lieu of offering the entire document, the following statement was received in evidence:

Bleecker Street and Fulton Ferry Railroad Company Lease.

(*a.*) Lessee: Twenty-third Street Railway Company.

(*b.*) Dated: January 10, 1876.

(*c.*) Term: 99 years from January 10, 1876.

(*d.*) Rental: Lessee to pay dividends on the stock at the rate of one and one-half per cent. per annum on $900,000 par value stock of lessor, and also interest on $700,000 par value first mortgage bonds at seven per cent. per annum, now reduced to four per cent. per annum; also to pay taxes, license fees and assessment.

(*e.*) Demises franchises and property.

(*f.*) Property demised, exclusive of franchises, includes, viz:

All the real estate of lessor company, except its depot and stable grounds and premises held under lease from the mayor, aldermen and commonalty of the city of New York, and the buildings thereon.

Also all rolling stock, including cars, horses, harness, tools and implements used in operation of road, together with equipment of depots and stables, contracts with other companies for the transfer of passengers and contracts for the use of tracks of other companies.

It is hereby *stipulated* that the franchises of the Bleecker Street and Fulton Ferry Railroad Company were acquired under chapter 514, Laws 1860, entitled "An act to authorize the construction of a railroad in Fourteenth street and in other streets and avenues of the city of New York;" and chapter 199, Laws of 1873, entitled "An act to authorize the Bleecker Street and Fulton Ferry Railroad Company of the City of New York to extend their railroad tracks through certain streets and avenues in the city of New York."

The acts above referred to are received in evidence as exhibits on behalf of the plaintiff.

Adjourned to Wednesday, September 4, 1901, at 11 a. m., at the capitol in the city of Albany, N. Y.

630 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* The Twenty-third Street Railroad Company
vs.
THE STATE BOARD OF TAX COMMISSIONERS. } No. 2.

ALBANY, N. Y., WEDNESDAY, *September* 4, 1901.

It is *stipulated*, for the purposes of this proceeding only, that the actual value of the tangible property of the above-named company connected with the several special franchises owned by it on the 8th day of January, 1900, is the amount specified in column No. 3 of the following tabulation, it being understood that such valuations are acceded to by the plaintiff company without prejudice to its contention that the value of said tangible property did not exceed the amount specified in column No. 4 of said tabulation.

Said tabulation, subject to the foregoing stipulation, is received in evidence as follows:

631 *Tabulation.*

Special franchises and value of tangible property in streets connected therewith owned on the second Monday of January, 1900, by the plaintiff company.

1	2	3	4
Date of franchise.	Initial street.	Reproduction, etc.	Value less depreciation.
(1) Chap. 823, Laws 1869.	23d street.	$589,300	$99,840
(2) Chap. 100, Laws 1873.	2d Ave. & 28th St.	21,046	160

It is *stipulated* that the plaintiff company was notified by the State Board of Tax Commissioners under date of April 28, 1900, that its special franchises, including the tangible property connected therewith, had been valued and assessed at the sum of $1,979,276.

Plaintiff rests.

Adjourned to Tuesday, September 17, 1901, at 11 a. m., at the capitol, in the city of Albany.

632 (DEFENDANTS' EXHIBITS NOS. 1 & 2.)

ALBANY, N. Y., TUESDAY, *September* 17, 1901.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* TWENTY-third Street Railroad Company
vs.
THE STATE BOARD OF TAX COMMISSIONERS. } No. 2.

Adjourned to Wednesday, September 18, 1901.

ALBANY, N. Y., WEDNESDAY, *September* 18, 1901.

Defendants' counsel offered in evidence the report of the Twenty-third Street Railroad Company to the State board of railroad commissioners for the year ending June 30, 1899, page 1436.

Objected to as immaterial, irrelevant and improper.

Objection overruled. Exception.

Defendants' counsel offered a like report for the year 1900, page 1471.

Same objection, ruling and exception.

Marked "Defendants' Exhibits Nos. 1 & 2, Sept. 18, 1901.—J. M. R."

The following is a copy of the report of the Twenty-third Street Railroad Company to the State board of railroad commissioners for the year ending June 30th, 1899, as found on page 1436 of the report of the State board of railroad commissioners for that year:

(DEFENDANTS' EXHIBIT No. 1.)

Twenty-third Street, lessor. Lessee, Metropolitan Street.

(Date of charter, January 29, 1872.)

For history of organization, etc., see report of 1894.

Capital Stock and Funded Debt.

Capital stock.

	Common.	
	Number of shares.	Total par value.
Authorized by law or charter, and now outstanding	600	$600,000
Number of stockholders		55

Funded debt.

Designation of lien.	Date.	Term, years.	Interest.		Amount authorized and outstanding.
			Rate.	When payable.	
			p. c.		
First mortgage bonds	Oct. 11, 1893	15	6	Jan. and July	$250,000
150 debenture bonds, $1,000 each	Jan. 1, 1886	20	5	Jan. and July	150,000
Total					$400,000

Per mile of road owned, 1.80 miles.	Capital stock outstanding	$333,333.33
	Funded debt outstanding	222,222.22

634 *Cost of Road and Equipment.*

Road.	Additions or betterments during year ending June, 30, 1899.	Total cost of road and equipment up to June 30, 1899.
Track and roadway construction	$351,542.85	
Overhead and underground construction	498,776.99	
Engineering expenses	5,509.96	
Right of way	1,073.74	
Buildings and fixtures used in operation of road	37,466.48	
Total cost of road	$ 4,370.02	$1,754,270.73
Equipment.		
Motor cars	$117,562.50	
Total cost of equipment	$117,562.50	$318,726.46
Grand total cost of road and equipment	$1,011,932.52	$2,072,997.19

Cost of road per mile owned	$974,594.85
Cost of equipment per mile of road owned	177,070.25
Cost of road and equipment per mile of road owned	1,151,665.10

Details of additions or betterments during the year.

Track and roadway construction on Twenty-third street from East river to North river	$351,542.85
Overhead and underground	487,776.99
Engineering expenses, right of way, etc	6,583.70
Buildings, new construction at Twenty-third Street car house	37,466.48
Equipment new electric cars, 45 cars, with brakes, fenders, etc	117,562.50
Total	$1,011,932.52

635 *Income Account for Year Ending June* 30, 1899.

Income from all sources, as follows, viz.:	
Rentals from lessee	$108,000.00
Payments from income, as follows, viz.:	
Dividends declared, 18 per cent. on capital stock	108,000.00

General Balance Sheet June 30, 1899.

Assets.

Cost of road	$1,754,270.73
Cost of equipment	318,726.46
	$2,072,997.19

Liabilities.

Capital stock	$600,000.00
Funded debt	400,000.00
Due lessee company for additions and betterments	1,011,932.52
Profit and loss (surplus)	61,064.67
	$2,072,997.19

Mileage and Miscellaneous Statistics.

Maximum speed, miles per hour	6
Rate of fare per passenger	5 c.
Cars are run every	1 to 3 min.
Car house	1
Number horses owned	371
Total assessed value of real estate and personal property of company	$775,500.00
Steam railroad crossing at grade protected by gates, flagmen or crossing alarm	1

Passenger cars are heated by stoves and electricity, lighted by oil.

636 *Characteristics of Road and Equipment.*

Track.	Miles owned.	Miles operated under trackage rights.	Total miles operated.
Single track, main line, electric	1.60	.....	1.60
Single track, main line, operated by horses	.....	6.46	6.46
Single track, branches, operated by horses	.20	.....	.20
Total single track	1.80	6.46	8.26
Second track, main line, cable	1.75	.....	1.75
Second track, main line, operated by horses	.....	6.36	6.36
Second track, branches, operated by horses	.20	.....	.20
Total second track	1.95	6.36	8.31
Grand total, tracks, sidings and turnouts	3.75	12.82	16.57
Laid with steel rails	3.75	12.82	16.57

Weight of rails per yard—steel—maximum, 110 lbs.; minimum, 47 lbs. Gauge of track, 4 feet 8½ inches.

Equipment.	Number owned.		Number equipped with fenders.
	Motors.	Other than motors.	
Box cars	51	24	51
Service cars	1	2	1
Snow-plows	.....	2	
Sweepers	.....	2	
Total	52	30	52

Name of road or branch.	From—	To—	Miles owned.	Miles trackage rights.	Total number of miles operated.
23d Street Ferry	23d St. ferry, N. river	23d St. ferry, E. river	3.35	.76	4.11
34th Street Ferry	2d Ave. & 23d St	34th St. ferry, E. river	.40	1.04	1.44
Bleecker St. & Fulton Ferry	23d St., N. river	Fulton ferry		6.30	6.30
14th Street line	14th St. & 9th Ave	14th St. & 4th Ave		1.82	1.82
Crosby St. branch	Bleecker & Greene	Canal & Elm		1.65	1.65
Bowery branch	Canal & Bowery	Beekman & South		.37	.37
Bowery branch	Fulton & Water	Canal & Bowery		.62	.62
Canal Street branch	Canal St. & Bowery	Canal & Elm		.26	.26
Total			3.75	12.82	16.57

638 *Officers of the Company.*

Name.	Title.	Official address.
H. H. Vreeland....	President.....	621 Broadway, New York city.
Charles E. Warren..	Secretary.....	621 Broadway, New York city.
Hans S. Beattie.....	Treasurer.....	621 Broadway, New York city.
H. A. Newell, Jr.....	Superintendent.	621 Broadway, New York city.

Directors of the Company.

Name.	Residence.
H. H. Vreeland.....	New York city.
W. L. Elkins.....	Philadelphia, Pa.
P. A. B. Widener.....	Philadelphia, Pa.
Thomas Dolan.....	Philadelphia, Pa.
George W. Widener.....	Philadelphia, Pa.
D. B. Hasbrouck.....	Brooklyn, N. Y.
Charles E. Warren.....	Noroton, Conn.
Henry A. Robinson.....	Yonkers, N. Y.
Hans S. Beattie.....	New York city.
S. V. Cadwell.....	New York city.
R. L. Anderton, Jr.....	New York city.
F. S. Pearson.....	New York city.
Oren Root, Jr.....	New York city.

Title of company, Twenty-third Street Railway Company.
General offices at 621 Broadway, New York city.
Date of close of fiscal year, June 30.
Date of stockholders' annual meeting, third Monday in June.
For information concerning this report, address Charles E. Warren, secretary.

The following is a copy of the report of the Twenty-third Street Railroad Company to the State board of railroad commissioners for the year ending June 30th, 1900, as found on page 1471 of the report of the State board of railroad commissioners for that year.

Twenty-third Street, lessor. Lessee, Metropolitan Street.

(Date of charter, January 29, 1872.)

For history of organization, etc., see report of 1894.
Electric cars commenced operation on March 19, 1899.

Capital Stock and Funded Debt.

Capital stock.

	Common.	
	Number of shares.	Total par value.
Authorized by law or charter, and now outstanding	600	$600,000
Number of stockholders		54

Funded debt.

Designation of lien.	Date.	Term, years.	Interest.		Amount authorized and outstanding.
			Rate.	When payable.	
			p. c.		
First mortgage bonds	Oct. 11, 1893	15	6	Jan. and July	$250,000
150 debenture bonds, $1,000 each	Jan. 1, 1886	20	5	Jan. and July	150,000
Total					$400,000

Per mile of road owned, 1.99 miles.	Capital stock outstanding	$301,507.54
	Funded debt outstanding	201,005.03

640 *Cost of Road and Equipment.*

Road.	Additions or betterments during year ending June 30, 1900.	Total cost of road and equipment up to June 30, 1900.
Track and roadway construction	$70,810.45	
Underground construction	156,769.40	
Superintendence and organization expenses	3,468.90	
Law expenses	11,296.49	
Engineering expenses	3,815.52	
Right of way	182.33	
Buildings and fixtures used in operation of road	2,581.29	
Interest and discount charged to construction	113,500.00	
Total cost of road	$362,424.38	$2,116,695.11
Equipment.		
Total cost of equipment		318,726.46
Grand total cost of road and equipment	$362,424.38	$2,435,421.57

Cost of road per mile owned	$1,063,665.88
Cost of equipment per mile of road owned	160,164.05
Cost of road and equipment per mile of road owned	1,223,829.93

Details of Additions or Betterments During the Year.

Change of motive power:

Track and roadway construction on Twenty-third street, from East river to North river	$70,810.45
Underground construction, as above	156,769.40
Superintendence, law and engineering expenses, right of way, etc.	18,763.24
Buildings, new construction at Twenty-third Street car house	2,581.29
Interest on amount advanced by Metropolitan Railway Company to change motive power	113,500.00
Total	$362,424.38

641 *Income Account for Year Ending June* 30, 1900.

Income from all sources as follows, viz.:

Rentals from lessee	$108,000.00

Payments from net income, as follows, viz.:

Dividends declared, 18 per cent. on capital stock	108,000.00

General Balance Sheet, June 30, 1900.

Assets.

Cost of road	$2,116,695.11
Cost of equipment	318,726.46
	$2,435,421.57

Liabilities.

Capital stock	$600,000.00
Funded debt	400,000.00
Due lessee company for additions and betterments	874,356.90
Bills payable	500,000.00
Profit and loss (surplus)	61,064.67
	$2,435,421.57

Traffic, Mileage, and Miscellaneous Statistics.

Maximum speed, miles per hour	6
Rate of fare per passenger	5 c.
Cars are run every	1 and 3 min.
Car houses	1
Number horses owned	391
Steam railroad crossing at grade protected by gates, flagmen or crossing alarm	1

Passenger cars are heated by stoves and electricity, lighted by oil.

642 *Characteristics of Road and Equipment.*

Track.	Miles owned.	Miles leased and trackage rights.	Total miles operated.
Single track, main line, electric	1.85	.06	1.91
Single track, main line, operated by horses	.....	3.87	3.87
Single track, branches, operated by horses	.14	2.54	2.68
Total single track	1.99	6.47	8.46
Second track and sidings, main line, electric	1.99	.....	1.99
Second track and sidings, main line, operated by horses	.....	3.75	3.75
Second track and sidings, branches, operated by horses	.14	2.76	2.90
Total second track	2.13	6.51	8.64
Grand total, tracks and sidings	4.12	12.98	17.10
Laid with steel rail	4.12	12.98	17.10

Weight of rails per yard—steel—maximum, 113 lbs.; minimum, 47 lbs. Gauge of track, 4 feet 8½ inches.

Equipment.	Number owned.		Number equipped with fenders.
	Motors.	Other than motors.	
Box cars	51	24	51
Service cars	1	2	1
Snow plows		2	
Sweepers		2	
Total	52	30	52

Details of Roads Owned and Leased.

Name of road or branch.	From—	To—	Miles owned.	Miles leased.	Miles trackage rights.	Total number of miles operated.
23d Street	23d St. N. river	23d St. E. river	3.84		.76	4.60
34th Street branch	2d Ave. & 23d St	34th St. E. river	.28		1.04	1.32
Bleecker St. & Fulton Ferry	23d street & 11th Ave	Fulton ferry, E. river		11.80		11.18
Total			4.12	11.80	1.80	17.10

644 *Officers of the Company.*

Name.	Title.	Official address.
H. H. Vreeland.....	President.....	621 Broadway, New York city.
Charles E. Warren....	Secretary.....	621 Broadway, New York city.
Hans S. Beattie.....	Treasurer.....	621 Broadway, New York city.
H. A. Newell, Jr.....	Superintendent.	621 Broadway, New York city.

Directors of the Company.

Name.	Residence.
H. H. Vreeland.....	New York city.
W. L. Elkins.....	Philadelphia, Pa.
P. A. B. Widener.....	Philadelphia, Pa.
Thomas Dolan.....	Philadelphia, Pa.
George W. Widener.....	Philadelphia, Pa.
D. B. Hasbrouck.....	Brooklyn, N. Y.
Charles E. Warren.....	Noroton, Conn.
Henry A. Robinson.....	Yonkers, N. Y.
Hans S. Beattie.....	New York city.
S. U. Cadwell.....	New York city.
R. L. Anderton, Jr.....	New York city.
D. C. Moorehead.....	Jamaica, L. I., N. Y.
Oren Root, Jr.....	New York city.

Title of company, Twenty-third Street Railway Company.
General offices at 621 Broadway, New York city.
Date of close of fiscal year, June 30.
Date of stockholders' annual meeting, third Monday in June.
For information concerning this report, address Charles E. Warren, secretary.

Defendant's counsel offered in evidence the report and supplemental report to the State board of tax commissioners for the year ending June 30, 1900, made by the Twenty-third Street Railway Company.

Objected to as immaterial, irrelevant and improper.

Objection overruled. Exception.

Marked "Defendants' Exhibits Nos. 3 and 4, September 18, 1901—J. M. R."

The following are copies of the same:

645 (DEFENDANTS' EXHIBIT No. 3.)

REPORT

OF THE

TWENTY-THIRD STREET RAILWAY COMPANY

TO THE

STATE BOARD OF TAX COMMISSIONERS

OF THE

STATE OF NEW YORK

FOR THE

YEAR ENDING JUNE 30, 1900.

646 Office of the State Board of Tax Commissioners.

ALBANY, —— —, ——.

SIR: The following forms, prepared in conformity with the requirements of law, are forwarded you for use in preparing the report of your company required by section 34, chapter 712, Laws 1899.

☞ It is requested that you complete and forward such report as required by that act on or before December 1, 1901.

Very respectfully,

STATE BOARD OF TAX COMMISSIONERS.

Extract from Law Relating to Taxation of Special Franchises.

SECTION 1. Subdivision three of section two of the tax law is hereby amended to read as follows:

3. The terms "land," "real estate," and "real property," as used in this chapter, include the land itself above and under water, all buildings and other articles and structures, substructures and superstructures, erected upon, under, or above, or affixed to the same; all wharves and piers, including the value of the right to collect wharfage, cranage or dockage thereon; all bridges, all telegraph lines, wires, poles and appurtenances; all supports and inclosures for electrical conductors and other appurtenances upon, above and under ground; all surface, underground or elevated railroads, including the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets,

highways or public places; all railroad structures, substructures and superstructures, tracks and the iron thereon; branches, switches and other fixtures permitted or authorized to be made, laid or placed in, upon, above or under any public or private road, street or ground; all mains, pipes and tanks laid or placed in, upon, above or under any public or private street or place for conducting steam, heat, water, oil, electricity or any property, substance or product capable of transportation or conveyance therein or that is protected thereby, including the value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon, or through, any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes; all trees and underwood growing upon land, and all mines, minerals, quarries and fossils in and under the same, except mines belonging to the State. *A franchise, right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a "special franchise." A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise. No property of a municipal corporation shall be subject to a special franchise tax.*

647 SCHEDULE A.

Title of company—Twenty-third Street Railway Company.....
General offices at—621 Broadway, New York city.....
Date at close of fiscal year—June 30th.....
For information concerning this report address—Charles E. Warren,
....Secretary.

Officers of the company, with address:

President—H. H. Vreeland.....
.....621 Broadway.....
Vice-president—D. B. Hasbrouck.....
.....do.....
Secretary—Charles B. Warren.....
.....do.....
Treasurer—H. S. Beattie.....
.....do.....
Superintendent—H. A. Newell, Jr.....
.....do.....

648 SCHEDULE B.

Description of special franchise, showing streets, highways, or public places possessed or rights enjoyed and in what tax district or districts same is located

NOTE.—*If this information was given in former report and map filed, state such fact, giving only additional grants since June 30, 1900.*

.....

Twenty-third Street railway located in borough of Manhattan, city of New York, see printed franchise data and map attached.

.....

.....

This report should be accompanied by maps showing the location and extent of all property subject to taxation as a "special franchise."

649 SCHEDULE C.

Copy of special law, grant, ordinance, or contract or reference to general law under which "special franchise is held, possessed, or enjoyed and statement of any condition, obligation, or burden imposed upon such special franchise or under which the same is enjoyed."

NOTE.—*If this information was given in former report and copies filed state such fact, giving only additional rights since June 30, 1900.*

.....Twenty-third Street Railway Co.....

.....Franchises.....

.....Laws of 1869, chap. 823.....

..... " " 1872, " 521.....

..... " " 1873, " 100.....

.....

There was paid the city on behalf of this company $150,000 on purchase of the franchise at public auction held by the commissioners of the sinking fund, June 10th, 1869.

SCHEDULE D.

Statement of Assets and Liabilities June 30, 1900.

Assets.	Amount.	Liabilities.	Amount.
Cost of real estate and improvements	$2,116,695 11	Capital stock	$600,000 00
Cost of equipment	318,726 46	Funded debt	400,000 00
Stock and bonds of other companies		Accounts and bills payable	500,000 00
Material and supplies		Interest on funded debt due and accrued	
Accounts and bills receivable		Rentals due and accrued	
Cash on hand		Dividends unpaid	
		Due lessee Co. for additions and betterments	874,356 90
Profit and loss		Profit and loss	61,064 67
Total	$2,435,421 57	Total	$2,435,421 57

SCHEDULE E.

Capital Stock.

	No. shares.	Total par value.	Dividends declared during year.		Market value during year.		
			Rate.	When payable.	Highest.	Lowest.	Present.
Common issued	6,000	$600,000	18%	Quarterly.	400	390	400
Preferred issued							
Total	6,000	$600,000	18%				

SCHEDULE F.

Funded Debt.

Designation of lien.	Date.	Maturity.	Amount outstanding.	Interest.		Market value during year.		
				Rate.	When payable.	Highest.	Lowest.	Present.
1st mtg. bonds	Oct. 11, 1893	15 years.	$250,000	6%	Jan. & July	No sales.		125
Debentures	Jan. 1, 1886	20 "	150,000	5%	" "	106	102	102

652 SCHEDULE G.

Statement of Receipts and Disbursements for Year Ending June 30, 1900.

Receipts.

	Amount.
From actual operation	$
Interest and dividends	
Rentals	22,500.00
	108,000.00
Advertising	
Sales of stock	
Sales of bonds	
Bills payable	
Other sources	
Deficit	
Total	$130,500.00

653 SCHEDULE G.

Report below must be made in detail as called for.

Disbursements.

	Amount.
Salaries of general officers	$
Salaries of clerks and office expenses	
Law expenses	
Other operating expenses	
Maintenance	
Reconstruction	
New construction (extension) In streets	
New construction (extension) Outside streets	
Rentals	
Interest paid	22,500.00
Taxes on capital stock and earnings paid comptroller	
Taxes paid on special franchise	
Taxes on real estate in this State other than special franchise	
Taxes on personal estate in this State	
Taxes on property in other States	
Payments covered by sec. 46, tax law. Percentage on gross earnings paid municipality	
Payments covered by sec. 46, tax law.	
Payments covered by sec. 46, tax law. Other items	
Dividends paid 18 per cent. common stock	108,000.00
Dividends paid — per cent. preferred stock	
Amount paid for new street paving	
Surplus	
Total	$130,500.00

SCHEDULE K.

Statement of Cost to Reproduce New Property in Streets, Highways, etc., Value Less Depreciation.

Name of each township and city wherein located and wards in city where different tax rates prevail.	Present value of property in streets, highways and public places on basis of cost of reproduction. (New.)	Present value of property in streets, highways and public places. (Allowing depreciation.)	Present value of property outside streets, highways and public places on basis of cost of reproduction. (New.)
Manhattan borough	$750,000.00	$637,500.00	$150,000.00
City of New York	260,058.31	260,058.31	
Total	$1,010,058.31	$897,558.31	

SCHEDULE K.

And Same Outside with Assessments in Each Tax District.

Present value of property outside streets, highways and public places. (Allowing depreciation.)	Assessment of real estate in streets, highways, etc., in 1901.	Assessment of real estate outside streets, highways, etc., in 1901.	Remarks.
$120,000.00	$1,979,276.00	$354,000.00	

656 SCHEDULE L.

Detailed Statement of Shares of Stock Actually Owned in Other Corporations which are Taxable on Their Capital Stock, and All Other Nontaxable Securities Owned.

Description	Amount.
None.	
Total	
Value of tangible personal property, material, supplies, cars, wires, pipes, etc	$145,112.00
Total assessment of personal property (in suit)	200,000.00
Is there any contest on 1901 personal assessment?	Yes.

SCHEDULE H.

Statement in Detail of Rentals Paid.

Name of lessor.	Annual rental paid by lessee.	Portion used for payment of interest on debt of lessor.	Portion used for payment of dividends on capital stock of lessor.
Total amount of annual rental			

SCHEDULE J.

Statement in Detail of Rentals Received.

Name of lessee.	The annual amount.
Metropolitan Street Railway Co. pays 18 per cent. on $600,000.00 capital stock	$108,000.00
And interest on $400,000.00 funded debt	22,500.00

SCHEDULE M.

Details of Roads Owned and Leased.

Name of road.	From	To	Miles owned.	Miles leased.
23 St. R'y Co.	23 St. N. R.	23 St. E. R.	3.84	Electric.
34 St. branch	34 " E. R.	23 St. & 2 Ave	.28	Horse.
Bleecker St. & Fulton Ferry R. R. Co	23 St. & 11 Ave	Fulton F'y E. R.		10.76
		Total mileage	4.12	10.76

This schedule is applicable only to railroad corporations.

659 & 660 The accompanying blanks are an integral part of this report. A separate blank should be used for *each township, city, and for each ward in a city where the ward rates differ.* Additional copies will be furnished if a sufficient number does not accompany the report.

They are intended for detailed data showing character of construction. Whenever there are peculiar conditions that tend to cause more rapid depreciation than ordinary, or any special conditions that tend to make the property less valuable, additional data should be furnished.

If any report does not contain the proper blanks for the different fields of construction needed to make a satisfactory report other blanks will be furnished on request, covering surface street railroads, elevated railroads, surface steam railroads, telegraph, telephone, compressed air, oil, steam heat, electric light and power and subway construction. Other special blanks will be prepared if the nature of any special construction requires them.

The law requires that every report made under this section shall have annexed thereto the affidavit of the president, vice-president, secretary or treasurer of the association or corporation, or one of the persons or one of the members of the co-partnership making the same.

STATE OF NEW YORK, }
County of New York, } ss:

Charles E. Warren, secretary of the Twenty-third Street Railway Co., being duly sworn, deposes and says that the foregoing statements have been compiled from the books and records of this company, and after careful examination of the same, declares them to be a true, full and correct statement of the property of said company and the value thereof at the close of the year ending June 30, 1901, as well as of its financial condition and affairs on the said date, to the best of my knowledge and belief.

[L. S.] —— ——.

Subscribed and sworn to before me, this 18th day of December, 1900.

—— ——,

Notary Public, —— *County, N. Y.*

661 (DEFENDANTS' EXHIBIT No. 4.)

Form A–5.

Tax district ——.

NOTE.—Use one of these forms for each tax district.

Surface
Street railroads.
Animal power.
Cable conduit.
Conduit electric.
Electric overhead.
Other powers.

REPORT

OF THE

TWENTY-THIRD STREET RAILWAY COMPANY

OF

TANGIBLE REAL PROPERTY

Located in, upon, under, or above streets, highways, and public places.

☞ Pursuant to the provisions of section 43, chapter 712, Laws of 1899, you are requested to make report of the matters contained in the within blank, and return to this office on or before December 1st, 1901.

Yours very truly,

STATE BOARD OF TAX COMMISSIONERS.

Report Only on Property Located in, upon, under, or above Streets, Highways, and Public Places.

Laid or erected prior to June 30, 1901.									Laid or erected June 30 to Nov. 1, 1900.						
Conductors not in subway, exclusive of trolley wire.	Insulated conductors in subway.			Use these columns for overhead and underground conductors.		Third rail system.			Conductors not in subway, exclusive of trolley wire.	Use this column for overhead and underground conductors.	Insulated conductors in subway.			Third rail system.	
Miles.	Miles.	Character of insulation.	Pressure.	Size.	Age.	Miles.	Weight per yard.	Age.	Miles.	Size.	Miles.	Size.	Pressure.	Miles.	Weight per yard.
											5.08 3.96	1,000,000 m 500,000 m			

Value reproduced (new) $32,560
Present value (allowing depreciation)..... $27,676

663 Electric Railway, Overhead Construction.

Report Only on Property Located in, upon, under, or above Streets, Highways, and Public Places.

	Miles erected prior to June 30, 1901.					Poles.			Miles erected June 30 to Nov. 1, 1901.			
	Single track.	Double track.	Single or double trolley wire.	Size of trolley wire.	Age.	Average number per mile.	Height.	General description.	Single track.	Double track.	Single or double trolley wire.	Size of trolley wire.
Bracket cons												
Wooden poles												
Bracket cons.....												
Iron poles												
Span wire cons.....												
Wooden poles												
Span wire cons												
Iron poles												

Value reproduced (new) ..... $.....
Present value (allowing depreciation)..... ..... $.....

Report Only on Property Located in, upon, under, or above Streets, Highways, and Public Places.

10—345

Laid prior to June 30, 1901.							Laid June 30 to Nov. 1, 1900.				
Description of subway.			Kind of paving and ballast.	Manholes.		Age.	Description of subway.			Number of manholes.	Kind of paving and ballast.
Number of ducts.	Length (in feet) of subway.	Type of ducts.		Number.	Size.		Number of ducts.	Length (in feet) of subway.	Type of ducts.		
1 12 / 36	3,221	Cement & tile	Stone	16			1				
2 40	1,795	" "	"	9			2				
3 54	1,109	" "	"	6			3				
4 48	1,478	" "	"	7			4				
5 22 / 20	1,214	" "	"	6			5				
6 6	1,901	Cement	"	9			6				
7							7				
8							8				
9							9				

Value reproduced (new) $63,100.00
Present value (allowing depreciation) $53,623.34

Track, Surface Street Railroad.

Report Only on Property Located in, upon, under, or above Streets, Highways, and Public Places.

Laid prior to June 30, 1901.								Laid June 30 to Nov. 1, 1900.					
Motive power.	Miles measured as single track.	Rails.			Ties.		Kind of paving and ballast.	Miles measured as single track.	Rails.		Ties.		Kind of paving and ballast.
		Section.	Weight per yard.	When laid.	Number per mile.	Kind and size.			Section.	Weight per yard.	Number per mile.	Kind and size.	
Electric ..	3.84	Girder...	91 & 109	1896 & '98	.....	.....	Stone						
Horse	.14	Tram ...	47	Before 1894	.....	.....	"						
"	.14	"	"	" "	....	.....	"						
	4.12												

Give description, dimensions and age of all bridges, culverts, and trestles.

Value reproduced (new) $622,400.00
Present value (allowing depreciation)... $529,047.00

FOLDOUT(S) IS/ARE TOO LARGE TO BE FILMED

666 STATE OF NEW YORK, } ss.:
County of New York, }

Charles E. Warren, secretary of the — being duly sworn, deposes and says that the foregoing statements have been compiled from the books and records of this company and from facts in the possession of its officers and employees, and after careful examination of the same, declares them to be a true, full and correct statement of the property of said company and the value thereof as to all the matters herein set forth, to the best of my knowledge and belief.

——— ———.

Subscribed and sworn to before me, this 18th day of December, 1900.

——— ———,
Notary Public.

Defendants rest.

(Here follows map marked p. 666*a*.)

667 (*Stipulations.*)

It is *stipulated* that any exhibit not set forth in full in this record may be exhibited in any court before which this proceeding may come at any time and be considered by said court as if printed in full in these papers.

HENRY A. ROBINSON,
Attorney for Plaintiff.
JOHN C. DAVIES,
Attorney-General, for Defendants.

It is hereby *stipulated* that the foregoing record contains all the evidence taken before the referee bearing upon the issues herein.

HENRY A. ROBINSON,
Attorney for Plaintiff.
JOHN C. DAVIES,
Attorney-General, for Defendants.

668 (*Report of Earl, Referee.*)

Supreme Court, Albany County.

PEOPLE *ex Rel.* THE TWENTY-THIRD Street Railway Company *against* THE STATE BOARD OF TAX COMMISSIONERS. } Assessment of 1900. No. 2.

To the supreme court:

I, Robert Earl, referee in this case, find the following facts and conclusions of law, to wit:

Findings of Fact.

1.

That at the times hereinafter mentioned, the Twenty-third Street Railway Company (hereinafter also called the relator) was and still is a street railroad corporation created and existing under and pursuant to the laws of the State of New York, and has its principal office in the city of New York.

2.

That on January 8th, 1900, the relator was also the lessee of two street railroad franchises which were owned by the Bleecker
669 Street and Fulton Ferry Railroad Company.

3.

That the several streets, avenues and public places on which the relator has constructed and is engaged in operating a street surface railroad are set forth and enumerated in Exhibit 1.

4.

That a map of the borough of Manhattan in the city of New York was put in evidence by the relator as Exhibit 1, upon which are correctly delineated the street railroad franchises owned by the relator as they existed on the second Monday, that is the 8th day of January, 1900, and which map is hereby found to be correct and to contain a correct delineation of said franchises and is made a part of this finding.

5.

That on January 8th, 1900, the special franchise owned by the relator embraced two separately granted rights or privileges.

6.

That each of said rights and privileges had been separately granted on certain conditions and subject to the performance of the grantee thereof of certain terms, which conditions and terms appear in the schedules and charters annexed to the return herein and are hereby made a part of this finding.

7.

That by the terms of the grants to the relator under which
670 the relator company now holds and enjoys the two street railroad franchises hereinbefore referred to, it has paid to the city of New York sums and under acts of the legislature as follows:

By act of the legislature of the State New York, passed May 10, 1869, and constituting chapter 823 of the Laws of 1869, it was provided in substance that the commissioners of the sinking fund of the city of New York should sell at public auction to the highest bidder the right, privilege and franchise to construct, operate and use a railroad through, along and upon Twenty-third street, in the city of New York, from the North river to the East river, and that the person or corporation who should offer to pay into the city treasury the largest sum of money for such right, privilege and franchise should, on the payment of the amount of the bid, and upon compliance with certain other terms, receive from the said commissioners a certificate that he or they were entitled to such grant and were authorized to construct, operate and use the same in accordance with the terms of the same; that thereafter, in accordance with the said act, the said right, privilege and franchise were sold at public auction to one Sidney A. Yeomans for the sum of $150,000, that being the largest amount bid therefor, which sum was paid by the said Sidney A. Yeomans into the city treasury prior to July 11, 1872; that thereafter said Sidney A. Yeomans duly assigned his rights in said fran-

chise to the Twenty-third Street Railway Company; in consequence of which a certificate was issued, signed by the comptroller of the city of New York, certifying that said Sidney A. Yeomans had so paid said sum and had duly assigned his rights to the said franchise to the Twenty-third Street Railway Company, and that the said company was entitled to the grant, right and privilege mentioned and conferred in and by the aforesaid act passed May
671 10, 1869, and was authorized to construct, operate and use the same, subject to the conditions named in the said act.

8.

That prior to January 8th, 1900, the relator, by an instrument in writing dated April 25th, 1893, leased the railroads and railroad routes aforesaid, together with the rights, privileges and franchises to construct, operate and maintain the same and all its property of every kind and description except its franchises to be a corporation to the Houston, West Street & Pavonia Ferry Railroad Company, a street railroad corporation owning and operating a street railroad in the city of New York for the term of 1,000 years.

That thereafter the said Houston, West Street & Pavonia Ferry Railroad Company consolidated with other street railroad corporations owning and operating street railroads in the city of New York and thereby created and formed the Metropolitan Street Railway Company, and on January 8th, 1900, and for some time prior to October 1, 1899, the said Metropolitan Street Railway Company was in the possession of the street railway franchises, railroads and railroad routes aforesaid owned by the relator and was operating the same under and pursuant to said lease.

That said Metropolitan Street Railway Company operated the said railroads so leased by the relator in connection with other railroads in the city of New York in its possession, of some of which it was the lessee and of some the owner.

That the said Metropolitan Street Railway Company had formed and created continuous routes of travel throughout said city composed of several separate franchises, some of which were leased and some owned, among which were the special franchises owned by the relator, and operated cars and transported passengers over said continuous routes for a single fare without regard to the fact that
672 some of said special franchises were owned and some were leased by it.

9.

That prior to January 8, 1900, the relator had executed and delivered to Darius R. Mangam, as trustee, a mortgage to secure the payment of its bonds, amounting to the sum of $250,000, which mortgage conveyed to said trustee all street railroad franchises, railways, railroad routes and the real estate and personal property owned by the relator, and also prior to said January 8, 1900, the relator in addition thereto had issued its debenture bonds amounting to the sum of $150,000. All of the bonds secured by such mort-

gage and said debenture bonds, amounting in the aggregate to $100,000, had, prior to January 8, 1900, been issued and were outstanding and unpaid at that date.

10.

That by virtue of the statutes of the State there was granted to and became vested in the relator, and its predecessors in title, the franchises to construct, maintain, operate and use the street railroads as above described, which franchises are property and constitute interests in perpetuity in the streets.

11.

That the relator has filed with the State Board of Tax Commissioners all reports required by law or required to be filed by said commissioners. Copies of such reports are in evidence and reference is made thereto for their contents.

12.

That thereafter and on or about the 20th day of March,
673 1900, the State Board of Tax Commissioners, claiming to act under and pursuant to chapter 712 of the Laws of 1899, proceeded to fix and determine the valuation of the special franchises of the relator company at the sum of $2,330,140, and did thereupon make the assessment of such special franchises at the sum aforesaid.

13.

That immediately after making the assessment the State board gave to the relator company a notice in writing stating in substance that such assessment had been made, and that the total valuation of the relator's special franchises was $2,330,140, and that the State board would meet at its office in the city of Albany on the 10th day of April, 1900, at 10 o'clock a. m., to hear and determine any complaint concerning such assessment.

14.

That the relator company, by its counsel, appeared, pursuant to such notice, at the time and place therein stated, before the State board and requested to be informed by the board concerning and as to what was the amount which said board had determined to be the valuation of the tangible property of the relator company, and as to what was the amount fixed and determined by the board to be the valuation of the intangible franchises, rights and permissions of the relator company; and as to what was the method, rule or principle, if any, adopted and applied in ascertaining and determining the valuation; but the board refused to give the relator company the whole or any part of the information so requested.

15.

That the relator company thereupon complained of the assessment, and filed with the State board a written statement under oath specifying the grounds of its complaint.

674 16.

That thereafter and on or about the 30th day of April, 1900, the State Board of Tax Commissioners, still claiming to act pursuant to chapter 712 of the Laws of 1899, finally determined the valuation of the special franchises of the relator company to be the sum of $1,979,276, and on or about April 30, 1900, filed with the department of taxes and assessments in the city of New York a written statement of such valuation as finally fixed and determined by the State board, and at or about the same time gave notice to the relator company that such written statement had been filed with the department of taxes and assessments of the city of New York.

17.

That thereafter the commissioner of taxes and assessments of the city of New York prepared the assessment-rolls of the real and personal property of the several parts of the city for the year 1900, and entered thereon, before the final review or certification of such rolls by them, the valuation of such special franchises of the relator company as fixed by the State board, and having annexed thereto their certificate that the assessment-rolls were correct in accordance with the entries of the several books or records in that department, duly verified the same and delivered such assessment-rolls to the municipal assembly of New York city, as required by law, on the first Monday of July, 1900.

18.

That within fifteen days after the final completion and filing of the assessment-roll in the city of New York, the relator company applied for and obtained a writ of *certiorari* to review the assessment, pursuant to which writ this proceeding is pending.

675 19.

That the State board did not make a separate valuation or assessment of each franchise, right, privilege or permission owned by the relator, but made one valuation or assessment covering the special franchise of the relator in the streets of the city of New York, in the borough of Manhattan, and valued the special franchise owned by the relator on January 8, 1900, at the aggregate sum of $1,979,276.

20.

That in making such assessment against the relator, the State board fixed upon a certain figure as covering the value of the tan-

gible and intangible property together, and did not separately arrive at a valuation of the tangible and intangible parts respectively.

21.

That the tangible property of the relator company, the value of which was included in the assessment so made by the State board, had for many years previous to such assessment been entirely assessed by the local assessors in the city of New York.

22.

That for the purpose of this proceeding, it has been stipulated on this hearing by the parties that the value of the tangible property connected with the special franchise of the relator company, based upon its cost of reproduction, was, on January 8, 1900, the sum of $610,346.

23.

That the defendants valued the property of the relator at
676 what they deemed its full and fair value, taking into consideration the original report made by it to the board, subsequent supplemental or special reports, the report of the State railroad commissioners, the records of the State comptroller's office, the reports of the New York City department of assessment and taxes, and after consideration of information from experts retained by the board and of their confidential appraisers and special agents, and they also had before them the *Poor's Manual* and *Financial Chronicle*, and considered all of the elements, factors and considerations which they were enabled to gather from these sources. They based their valuation of the tangible property solely upon the cost of reproduction, with an allowance for depreciation.

Defendants considered, among other things, in arriving at their valuation of relator's property, the fact that it had the right, partly owned and partly acquired from another company, to operate two continuous lines from the East river to the North river; that it only owned the right to run over one of such lines, and that it leased the other of such rights; that the franchises of the relator was more or less valuable by reason of the acquisition of such right, whether the relator had contracts with another company to run over its lines; and the fact of its having control and operation of a leased line.

They had before them and considered a map showing the entire system of the Metropolitan Street Railway Company. They considered the fact that the said street railway franchise of the relator had been leased to and was operated by the Metropolitan Street Railway Company as a part of its system of railroads in the city of New York, the market value of the stocks and bonds of said Metropolitan Street Railway Company for what it might be worth and not as conclusive, or as an absolute measure of valuation. They considered the earning power of the property of the said Metropoli-

677 tan Street Railway Company and the relator company as reported to them by said companies. They considered the tax rate in New York county, also the character of the motive power used. They also considered the value of real estate off the line of the road; and assessed the special franchise at what the members of the board agreed was the full and fair value thereof.

That in addition to these facts, which were before the commissioners previous to the hearing of relator, the commissioners had upon and after said hearing, before them and considered the statements, evidence, affidavits and arguments upon such hearing for the purpose of arriving at their final conclusion as to the valuation of relator.

That in assessing the special franchise of the relator, and in arriving at the valuation thereof, the defendants did not include in such assessment the valuation of any property except such as is in, above, upon, under or running through the public streets and public places of said city, including the franchises, rights, authority or permission to construct, operate and maintain its foundation, roadbed, substructure, superstructure, with their appliances in, upon, above, under or through said streets and public places. They did not include in such assessment or valuation the value of the right to be or the franchise to be a corporation. They did not include the value of the good-will of the business carried on by such corporation, nor did they include the value of any property other than that above stated and described as having been included by them. That such assessment as made by such special franchise of the relator includes the value of the tangible and intangible property in the streets of the city of New York, and was arrived at upon consideration of all the facts and circumstances affecting the value of such property, including the use or right to use such streets and public places which the defendants were able to ascertain.

678 24.

That neither the annual gross nor net earnings derived from the operation of the special franchises owned by the relator can be ascertained, for the reason that said special franchises are operated by the Metropolitan Street Railway Company as a part of its system of railroads as hereinbefore stated, and said special franchises form part only of continuous routes of travel in the city of New York which have been established by the said Metropolitan Street Railroad Company and over which passengers are transported for a single fare.

25.

That the actual and true value of the special franchise of the relator as finally determined by the defendants and as I find is $1,979,276, and no evidence was given before me to show that it is less.

26.

That other real estate in the city of New York was assessed at only 67 per cent. of its actual and true value, and therefore to equalize this assessment with the assessment of such other real estate there should be deducted from the $1,979,276 the sum of $653,161.08, and there remains the sum of $1,326,114.92 as the value of the special franchise of the relator for the purpose of assessment and taxation under the special franchise tax act.

27.

That the following is a correct statement of the assessed value of real estate in the State and in the city of New York, respectively, for the years hereinafter stated:

Total assessed real estate in estate for 1899.....	$4,811,593,059
" " 1900.....	5,093,025,771
679 Total assessed value all special franchises in State for 1900.....	266,202,759
Total ass'd val. of tang. prop. for year 1899 included in the spec. franchises ass'd in 1900 for whole State.....	96,061,902

Total assessed value of real estate in New York city by boroughs for 1899.

Manhattan and Bronx	$2,178,605,905
Kings.....	609,822,267
Queens.....	103,752,600
Richmond.....	40,264,692
Total.....	$2,932,445,464

Total assessed value of all real estate in the city of New York, exclusive of tangible property included in the special franchise, by boroughs, for the year 1900.

Manhattan and Bronx.....	$2,369,997,504
Kings.....	651,383,900
Queens.....	104,427,872
Richmond.....	42,723,924
Total.....	$3,168,533,200

Total assessed value of all special franchises in the city of New York, by boroughs, for the year 1900.

Manhattan.....	$166,763,669
Bronx.....	7,272,249
Brooklyn.....	36,743,057
Queens.....	6,544,312
Richmond.....	2,356,064
Total.....	$219,679,351

Total assessed value of the tangible property for the year 1899, included in the special franchises assessed in 1900 for the city of New York, by boroughs.

Bronx	$3,768,600
Brooklyn	18,048,775
Manhattan	50,428,750
Queens	2,935,600
Richmond	1,403,500
Total	$76,585,225

680 *Conclusions of Law.*

1. That chapter 712 of the Laws of 1899, is a valid and constitutional enactment, practicable and operative, and that it gave authority to the defendants to assess the relator's special franchise for the purposes of assessment and taxation.

2. That the relator had a hearing and due process of law before the defendants upon the review of their assessment on the 10th day of April, 1900, and was not there deprived of any of its legal or constitutional rights.

3. That it was lawful to assess as one franchise, the franchise, right, authority or permission which the relator had in the streets of New York, and which it operated as one system.

4. That to equalize its assessment with the assessment of other real property in the city of New York, the relator is entitled to a deduction from its assessment of the sum of $653,161.08, and that the assessment as thus reduced, to wit, the sum of $1,326,114.92 must be taken as the value of the relator's special franchise for the purposes of assessment and taxation under the act above referred to, and that the necessary corrections should be made to that end in the assessment roll and tax books in the city of New York.

ROBERT EARL, *Referee.*

681 *Stipulation as to General Opinions of Earl, Referee.*

It is hereby *stipulated* that the general opinions of the referee in the franchise tax cases which are printed in the papers on appeal in the proceeding entitled *The People ex rel. Metropolitan Street Railway Company* against *The State Board of Tax Commissioners*, at pages 675 to 737, and presented to this court simultaneously herewith, are hereby referred to and made a part of the papers on appeal in this proceeding with the same force and effect as if herein set forth at length.

Stipulation as to Findings and Exceptions to Referee's Refusals to Find.

It is hereby *stipulated* that proposed findings of fact and conclusions of law were submitted by the relator to the referee prior to the making of his report, identical in form with those submitted to the court and hereinafter printed at pages 687 to 725 hereof, the same being relator's proposed findings of fact Nos. 1 to 86, and conclusions of law Nos. 1 to 70, all inclusive; also that the referee refused to find said proposed findings of fact and conclusions of law as submitted, except as found in his report printed at pages 668 to 680 hereof, and that exceptions were duly filed to the referee's refusals to find, identical in form and number with those filed to the court's refusal to find, hereinafter printed at page 743, the same being enumerated and specified in relator's exceptions numbered as paragraphs "10" and "11."

682 (*Exceptions to Referee's Report.*)

Supreme Court, Albany County.

PEOPLE *ex Rel.* THE TWENTY-THIRD Street Railway Company *against* THE STATE BOARD OF TAX COMMISSIONERS.	Exceptions to Referee's Report. Assessment of 1900. No. 2.

The relator herein, saving and reserving all objections to the manner and form of the findings of fact and conclusions of law of the referee herein not herein precisely and exactly specified, files the following exceptions to the same:

(1.) The relator specifically excepts to the referee's 5th finding of fact.

(2.) The relator specifically excepts to the referee's 19th finding of fact, and specifically to so much of said 19th finding of fact as finds or implies that all the street railway franchises, rights, privileges or permissions of the relator constitute but one special franchise.

(3.) The relator specifically excepts to the referee's 23d finding of fact and to each and every part thereof, and, without limiting this exception, further specifically excepts to so much of said 23d finding as finds that the respondents considered the market value of the relator's stocks and bonds for what it might be worth and not
683 as conclusive, or as an absolute measure of valuation, further specifically excepts to so much of said 23d finding as finds that the respondents in assessing the special franchise of the relator, and in arriving at the valuation thereof, did not include in such assessment the valuation of any property except as is in, above, upon, under or running through the public streets and public places of said city, in-

cluding the franchises, rights, authority or permission to construct, operate and maintain its foundation, roadbed, substructure and superstructure, with their appliances in, upon, above, under or through said streets and public places; and further specifically excepts to so much of said 23d finding as finds that the respondents did not include in such assessment or valuation the value of the right to be or the franchise to be a corporation; and further specifically excepts to so much of said 23d finding as finds that the respondents did not include the value of the good will of the business carried on by such corporation, nor did the respondents include the value of any property other than that stated and described in said 23d finding as having been included by them, and further specifically excepts to so much of said 23d finding as finds that such assessment as made by such special franchise of the relator includes the value of the tangible and intangible property in the streets of the city of New York, and was arrived at upon consideration of all the facts and circumstances affecting the value of such property, including the use or the right to use such public streets and public places which the respondents were able to ascertain.

(4.) The relator specifically excepts to the referee's 25th finding of fact, and to each and every part thereof; and further specifically excepts to so much of said 25th finding as finds "that the actual and true value of the special franchise of the relator as finally determined by the defendants and as I find is $1,979,276;" and
684 further specifically excepts to so much of said 25th finding as finds that "no evidence was given before me to show that it is less," both as a finding of fact and as an implied conclusion of law, and relator specifically excepts to such implied conclusion of law as found by the referee, and to the whole thereof, as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(5.) The relator specifically excepts to the referee's 26th finding of fact, and specifically to so much of said 26th finding that finds or implies that the value of the relator's special franchise is $1,979,276, and that the sum to be deducted is $653,161.08, and that $1,326,114.92 is the value of the relator's special franchises for the purpose of assessment and taxation under the special franchise tax act. The relator, however, does not except to so much of said 26th finding as finds or implies that other real estate in the city of New York was assessed at only 67 per cent. of its actual and true value, and that to equalize the relator's assessment with the assessment of such other real estate a deduction of 33 per cent. should be made from the actual value.

(6.) The relator specifically excepts to the 1st conclusion of law as found by the referee, and as to the whole thereof, as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(7.) The relator specifically excepts to the 2d conclusion of law as found by the referee, and as to the whole thereof, as against the evi-

dence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(8.) The relator specifically excepts to the 3d conclusion of law as found by the referee, and to the whole thereof, as against the
685 evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(9.) The relator specifically excepts to the 4th conclusion of law as found by the referee as against the evidence, contrary to the evidence, against the weight of evidence and unsupported by the evidence, except to so much thereof as finds or implies that the relator is entitled to a deduction from the actual value of its special franchise for the purpose of equalizing its assessment with the assessment of other real property in the city of New York.

Dated New York, July 7, 1902.

HENRY A. ROBINSON,
Attorney for Relator, 621 Broadway, Borough of Manhattan, New York City.

To John Franey, Esq., county clerk.

To Hon. John C. Davies, attorney-general, attorney for respondents.

686 (*Notice of Trial.*)

Supreme Court, Albany County.

PEOPLE *ex Rel.* THE TWENTY-THIRD STREET Railway Company *against* THE STATE BOARD OF TAX COMMISSIONERS. } Notice of Trial. Assessment of 1900. No. 2.

SIR: Please take notice, that upon the report of Hon. Robert Earl, the referee herein, and upon the petition, writ of certiorari, return, the evidence and proceedings before the referee, and all the papers and proceedings herein, we shall move before this honorable court at a special term thereof, to be held at the county court house, in Albany county, on the 15th day of July, 1902, at ten o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, that the court proceed to hear, try and determine this proceeding; and you will

Further please take notice, that we shall then and there bring on this proceeding to a hearing and trial, and shall move for a final order confirming the assessment made herein on or about the 30th day of April, 1900, and for such other or further relief or both, as to this court may seem to be just and proper in the premises.

Dated July 7, 1902.

JOHN C. DAVIES,
Attorney-General, Attorney for Respondents, Albany, New York.

To Henry A. Robinson Esq., attorney for relator.

687 (*Proposed Findings.*)

Supreme Court, Albany County.

PEOPLE *ex Rel.* TWENTY-THIRD STREET RAILWAY COMPANY *against* THE STATE BOARD OF TAX COMMISSIONERS. } No. 2. Assessment of 1900.

Plaintiff's proposed findings of fact and conclusions of law.

The Twenty-third Street Railway Company, the relator in the above-entitled proceeding, hereby proposes the following as findings of fact and conclusions of law to be made by the special term of this court herein.

Findings of Fact.

(1.) At the times hereinafter mentioned, The Twenty-third Street Railway Company (hereinafter also called the relator) was, and still is, a street railroad corporation created and existing under and pursuant to the laws of the State of New York, and has its principal office in the city of New York.

688 (2.) The several streets, avenues and public places on which the above named corporation has constructed and is engaged in operating street surface railroads are set forth and enumerated in Exhibit 1.

(3.) All the rights, privileges and franchises granted to the relator or its predecessors in title, to construct and operate street railroads, together with all exemptions and immunities to which the original grantees of the said rights, privileges and franchises became or were entitled, are now vested in the relator, The Twenty-third Street Railway Company.

(4.) Each right and privilege to construct and operate a street railroad, which was owned by the relator, and the railroad which the relator had constructed upon the streets where it possessed such right, constituted a special franchise as the same is defined in the tax law of this State.

(5.) Each of said rights and privileges had been separately granted on certain conditions and subject to the performance by the grantee thereof of certain terms, which conditions and terms differed substantially in the case of each separate grant.

(6.) A map of the borough of Manhattan in the city of New York was put in evidence by the relator as Exhibit 1, upon which *is* correctly delineated the several special franchises which were, on the second Monday, that is the 8th day of January, 1900, and are now owned and leased by the relator, and which map is hereby found to be correct and to contain a correct delineation of said franchises and is made a part of this finding.

689 (7.) On January 8th, 1900, the special franchises owned by the relator company consisted of two separately granted special franchises.

(8.) On January 8th, 1900, the relator was also the lessee of two special franchises which were owned by the Bleecker Street and Fulton Ferry Railroad Company.

(9.) All of the special franchises so owned and leased by the relator were operated by the relator under and as one system. Some of such special franchises were operated by the underground system of electricity, and some by horse power.

(10.) Prior to January 8th, 1900, the relator had executed and delivered to Darius R. Mangam as trustee, a mortgage to secure the payment of its bonds amounting to the sum of $250,000, which said mortgage conveyed to said trustee all the special franchises and the real estate and personal property owned by the relator and also prior to January 8, 1900, the relator in addition thereto had issued its debenture bonds amounting to the sum of $150,000. All of the bonds secured by said mortgage and said debenture bonds, amounting in the aggregate to $400,000, had prior to January 8, 1900, been issued for cash and were outstanding and unpaid at that date.

(11.) On the 30th day of October, 1899, the relator filed with the State Board of Tax Commissioners (hereinafter also referred to as the State board) a report for the year ending June 30, 1899, verified on the 27th day of October, 1899, by a proper officer, and thereafter filed supplemental reports on dates as follows: January 3rd, 1900, and January 24th, 1900; such reports being filed upon the
690 request of the State board and being made pursuant to chapter 712 of the Laws of 1899, and containing the information requested by the State board and being in conformity with blanks prepared and furnished by them.

(12.) These reports of the relator contained a full description of every special franchise possessed or enjoyed by it, together with copies of special laws, grants and contracts and a reference to general laws, under which such special franchises were held and enjoyed, and a statement of all conditions, obligations, or burdens imposed upon each of such special franchises and under which the same were enjoyed by the relator, together with all other information relating to the value of such special franchises required by the State board.

(13.) In such report and supplemental reports, the relator reported to the State board the tangible property connected with its special franchises, consisting of railroad structures, sub-structures, tracks, and the iron work thereof, and the other fixtures permitted and authorized to be made, laid, or placed in, upon, above, or under the streets, highways and public places, and the value thereof based upon the cost of reproducing the same.

(14.) The information asked for by the State board, and furnished in the aforementioned reports, so far as it concerned the earnings of the relator or the statistics relating to the construction of the surface

railways or to the cost of reconstruction, covers operations of the company for the year ending June 30, 1899.

691 (15.) The blank forms so supplied by the State board to the relator, and which were returned duly filled out by the relator to the State board, specified all the information requested by the State board to enable it to make its assessment.

(16.) These forms of reports, as contained in the testimony and marked Plaintiff's Exhibits 66*a*, 66*b* and 66*c*, are made a part of this finding as correct copies of the forms aforesaid.

(17.) Thereafter and on or about the 20th day of March, 1900, the State Board of Tax Commissioners, claiming to act under and pursuant to chapter 712 of the Laws of 1899, proceeded to fix and determine the valuation of the special franchises of the relator company at the sum of $2,330,140, and did thereupon make the assessment of such special franchises at the sum aforesaid.

(18.) Immediately after making the assessment, the State board gave to the relator company a notice in writing stating in substance that such assessment had been made, and that the total valuation of the relator's special franchises was $2,330,140, and that the State board would meet at its office in the city of Albany on the 10th day of April, 1900, at 10 o'clock a. m., to hear and determine any complaint concerning such assessment.

(19.) The relator company, by its counsel, appeared, pursuant to such notice, at the time and place therein stated, before the State board, and requested to be informed by the board concerning, and as to what was, the amount which said board had determined

692 to be the valuation of the tangible property of the relator company, and as to what was the amount fixed and determined by the board to be the valuation of the intangible franchises, rights and permissions of the relator company; and as to what was the method, rule or principle, if any, adopted and applied in ascertaining and determining the valuation; but the board refused to give the relator company the whole or any part of the information so requested.

(20.) The State board refused to inform the relator what was the valuation fixed and determined by it of the tangible property included in the relator's special franchises, or what was the method, rule or principle adopted by the State board in fixing and determining the valuation of the relator's franchises, rights and permissions to construct and maintain its railway upon the various streets, avenues, highways and public places hereinbefore referred to.

(21.) The relator asked the State board and the members thereof for, but was refused, the full and fair hearing provided for and contemplated by section 44 of article 2 of the tax law, the statute in such case made and provided.

(22.) The relator company thereupon complained of the assessment, and filed with the State board a written statement under oath specifying the grounds of its complaint.

(23.) In its written complaint, the relator company complained that the assessment was incorrect because illegal, erroneous for over-

valuation and unequal, and specified among the grounds of such illegality, overvaluation and inequality, in substance, that the
693 State Board of Tax Commissioners had no jurisdiction, right or authority to make such assessment, for the reason that all the provisions of the statute known as chapter 712 of the Laws of 1899 were unconstitutional and void, and violated both the Federal and State constitutions; and that the said statue did not prescribe any definite method of valuation and was so vague and indefinite that it could not be administered by the taxing officers or enforced by the courts, and that the statute did not provide any definite rule by which the said State board could value relator's special franchises; that the said State board in making said valuation had not followed or applied any rule, method or principle of valuation; that the relator's special franchises were granted under and pursuant to contracts which exempted the said special franchises from taxation, and that the said assessment impaired the obligations of the contracts by which said special franchises were acquired and are now owned, possessed and operated by the relator company, and violated in this respect the Federal Constitution; that said assessment was further illegal in that all the special franchises of the relator company were valued and assessed as one special franchise, instead of being separately valued and assessed, and also in that the said State board refused to inform the relator of the separate valuations placed by the State board upon the tangible property and the intangible property connected with the relator's special franchises, and further in that the State board did not give the relator the hearing to which the relator was entitled under the laws and constitution of the State; that the said assessment was erroneous by reason of over-valuation to the extent of two million dollars; that the said assessment was unequal in that it was made at a higher proportionate valuation than the
694 assessment of other special franchises of the same character, to wit, franchises to operate street railroads in the city of New York or in the State of New York, and also because made at a higher proportionate valuation than the assessment of other real estate in the city of New York or in the State of New York.

(24.) Thereafter and on or about the 30th day of April, 1900, the State Board of Tax Commissioners, still claiming to act pursuant to chapter 712 of the Laws of 1899, finally determined the valuation of the special franchises of the relator company to be the sum of $1,979,276, and on or about April 30, 1900, filed with the department of taxes and assessments in the city of New York a written statement of such valuation as finally fixed and determined by the State board, and at or about the same time gave notice to the relator company that such written statement had been filed with the department of taxes and assessments of the city of New York.

(25.) Thereafter the commissioners of taxes and assessments of the city of New York prepared the assessment rolls of the real and personal property of the several parts of the city for the year 1900, and entered thereon before the final review or certification of such rolls by them the valuation of such special fran-

chises of the relator company as fixed by the State board, and having annexed thereto their certificate that the assessment rolls were correct in accordance with the entries of the several books or records in that department, duly verified the same, and delivered such assessment rolls to the municipal assembly of New York city, as required by law, on the first Monday of July, 1900.

(26.) Within fifteen days after the final completion and
695 filing of the assessment roll in the city of New York, the relator company applied for and obtained a writ of certiorari to review the assessment, pursuant to which writ this proceeding is pending.

(27.) The State Board of Tax Commissioners did not nor did any of the members of such board verify the valuation of relator's special franchises, as finally fixed and determined by the State board; nor at any time certify to the same under oath as being the true and correct valuation.

(28.) Neither the State board nor any member thereof at any time personally visited the railroads, tracks or superstructure or any of the tangible property connected with the special franchises of the relator, nor personally visited the railroads in operation, to aid them in arriving at a valuation.

(29.) In fixing and determining the valuation of the special franchises of the relator company, no rule, method or principle was followed by the State board.

(30.) The State board was unable to devise or find any general rule, method or principle to adopt in making the various valuations and assessments of the special franchises of the relator and of the other companies or individuals whose special franchises it assessed.

(31.) The State board was unable to apply any special rule, method or principle whatsoever in making the said assessments or valuations in any particular case.

(32.) In valuing the special franchises of the relator, the State board neither had nor applied any general rule, method or principle
of valuation which was applicable to all special franchises
696 to construct, maintain and operate street railroads generally within the State, nor any rule, method or principle which was applicable to the valuation of special franchises to construct, maintain and operate street railroads in the city of New York.

(33.) In valuing the special franchises of the relator, the State board made one valuation to cover all special franchises of the relator and made one assessment of all such special franchises together, and did not make a separate valuation or assessment of each special franchise.

(34.) In valuing the special franchises of the relator for the purposes of assessment, the State board treated all of such special franchises which were owned by the relator on January 8th, 1900, as a single franchise, and valued them at the aggregate sum of $1,979,276.

(35.) In valuing the special franchises of the relator for the purposes of assessment aforesaid, the State board treated all of such

special franchises as part of one franchise, and as such valued them as a single special franchise.

(36.) In making such assessment against the relator, the State board fixed upon a certain figure as covering the value of the tangible and intangible property together, and did not separately arrive at a valuation of the tangible and intangible parts respectively.

(37.) The tangible property of the relator company, the value of which was included in the assessment so made by the State board, had for many years previous to such assessment been entirely assessed by the local assessors in the city of New York.

697 (38.) For the purpose of this proceeding, it has been stipulated by the parties that the value of the tangible property connected with the special franchises of the relator company, based upon its cost of reproduction, was on January 8th, 1900, the sum of $610,346.

(39.) The difference between $610,346 (the amount stipulated for the purpose of this proceeding to be the value of the tangible property connected with the relator's franchises) and the amount of the State board's valuation of the said special franchises, to wit, the sum of $1,979,276, is $1,368,930, which, therefore, is the State board's valuation of the special franchises of the relator, exclusive of tangible property connected therewith.

(40.) In assessing the special franchises of the relator company, the State board assessed them as integral parts of a system composed of the relator company and of other street railway companies making up the systems known as the Metropolitan and Central Crosstown systems, considered as one system, and that the valuations so placed upon the special franchises of the component companies of the said systems, and the valuation of the tangible property connected therewith at the amount stipulated to be correct for the purposes of this proceeding, are as follows:

Name of company.	Assessed valuation.	Stipulated value of tangible property.
Metropolitan St. R'y Co	$18,377,911	$5,651,196
23d St. R. R	1,979,276	610,346
28th & 29th St. C. T	350,473	107,150
Fulton St. R. R	104,530	15,500
34th St. C. T	783,547	25,000
Bl. St. & Fulton F'y	323,811	154,179
42d St. & G. St. F'y	650,613	103,300
C. P. N. & E. R	1,954,712	763,844
9th Ave	1,789,386	754,573
8th Ave	3,968,256	2,105,440
6th Ave	3,917,260	1,599,012
2d Ave	4,057,447	1,486,433
698 B'way & 7th Ave	6,319,400	688,811
N. Y. & Harlem	6,405,075	2,433,829
Central C. T	585,693	52,980
Ch. & 10th St	726,927	57,000
	$52,292,317	$16,608,593

(41.) In valuing the special franchises owned by the relator for the purposes of assessment at the sum of $1,979,276, the State board considered the market value of the share stock of the relator and the market value of the bonds of the relator as appreciating factors which entered into such valuation.

(42.) In valuing the special franchises owned by the relator for the purposes of assessment as aforesaid, at the sum of $1,979,276, the State board considered, as appreciating factors of value of the said special franchises (which entered into the final valuation), the market value of the share stock of the relator and the market value of the bonds of the relator secured to be paid by the aforesaid mortgage for $250,000 last above mentioned, and also the market value of the debenture bonds issued by the relator company as aforesaid, and all of which were outstanding and unpaid at the date of such valuation.

(43.) In valuing the special franchises owned by the relator for the purpose of assessment as aforesaid, the State board considered the amounts of the gross and net earnings derived from the operation of the system of railways of the relator as appreciating factors, entering into their valuation.

(44.) In valuing the special franchises owned by the relator for the purpose of the assessment as aforesaid, the State board considered the value of all the assets of the relator as an appreciating factor entering into their valuation.

699 (45.) In valuing the special franchises of the relator as aforesaid, the State board considered the value of the corporate assets of the company as an appreciating factor entering into their valuation, and, for that purpose, fixed upon a certain sum as representing the value of the corporate assets of the company.

(46.) In valuing the special franchises owned by the relator for the purposes of assessment as aforesaid, the State board fixed, at a certain sum, in its judgment, the value of the good will of the relator, and considered it as an appreciating factor entering into their valuation.

(47.) In valuing the special franchises owned by the relator for the purposes of assessment as aforesaid, the State board considered as appreciating factors entering into their valuation the rights of the relator to operate cars over the lines owned by other corporations, which lines are operated as part of the same system.

(48.) In valuing the special franchises of the relator for the purposes of assessment, the State board considered as appreciating factors (entering into their final valuation) the earning capacity of the corporation and its business methods, including the right to operate its cars over continuous routes owned by other companies, and the transfer of passengers from one route to another for a single fare.

(49.) The State board in fixing the value of the special franchises owned by the relator on January 8th, 1900, considered as appreciating factors entering into their final valuation the value of all the assets of the relator; the gross and net earnings which the Metropolitan Street Railway Company derived from the
700 operation of its system of railways in the borough of Manhattan, consisting of roads constructed upon franchises owned by it and also of roads constructed upon franchises leased by it from other railroad corporations, including among said last-named franchises the special franchises of this relator; the methods of operation of the said system of railways; the right which the relator possessed to transfer passengers from one line of operation to another, and the right it possessed to run its cars over other special franchises which the Metropolitan Street Railway Company leased or controlled; and the right it possessed to create and operate continuous routes of travel by the union of special franchises, some of which it leased and others of which it owned.

(50.) In valuing the special franchises of the relator company, this State board considered, as elements of value, which entered into their final valuation, the value of such special franchises for railroad purposes, and their position with their connections, and also the productive capacity of said system.

(51.) In valuing the special franchises of the relator, said State board took into consideration, as appreciating factors of value, the operation as a whole of the systems known as the Metropolitan and Central Crosstown systems considered as one railroad system, including the value of the business skill and personal management

of such railroad system, of which the special franchises of the relator were considered as an integral part.

(52.) In valuing the special franchises of the relator company, the State board considered them as an integral part of a complete system created for the purpose of realizing pecuniary profit, and in-
701 cluded the value of the business skill and management of such railroad system as appreciating factors entering into their final valuation.

(53.) In valuing the special franchises owned by the relator for the purposes of assessment as aforesaid, the State board took into consideration the tax rate prevailing on real estate in New York county.

(54.) No basis for the determination of the value of the relator's special franchises is afforded by the consideration of the matters (or any of them) above set forth, that is to say: The market value of the share stock of the relator, the market value of the bonds of the relator, the amounts of the gross and net earnings derived from the operation of the system of railways of the relator; the value of all the corporate or other assets of the relator; the value of the good-will of the relator; the rights of the relator to operate cars over lines owned by other corporations; the earning capacity of the relator and its business methods and skill; the methods of operation and the personal management of the relator's system of railways; the right which the relator possessed to transfer passengers from one route or line of operation to another for a single fare; the right which the relator possessed to create and operate continuous routes of travel by the union of special franchises, some of which it leased and others of which it owned; the productive capacity of the said system; and the operation of the relator's system of railroads as a whole.

(55.) In valuing, for purposes of assessment as aforesaid, the special franchises owned by the companies whose roads were leased to the relator or other companies, the State board considered the
702 rentals agreed to be paid as appreciating factors of value; that is to say, the greater the sum agreed to be paid under the lease, the larger the valuation which was placed upon the line covered by the lease.

(56.) It is impossible to ascertain what part of the market value of the share stock and bonds of the relator represents the value of the special franchises owned by it and what part represents the value of its leasehold interest in the special franchises which it holds under leases as aforesaid.

(57.) There was no testimony or data before the State board which enabled it to determine what portion of relator's gross earnings comes from the transportation of passengers over the special franchises owned by the relator.

(58.) The evidence in this proceeding does not furnish data from which can be determined what portion of the gross earnings of the relator comes from the transportation of passengers over the special franchises owned by the relator.

(59.) The evidence in this proceeding shows it is impossible to ascertain and determine what portion of the gross earnings of relator comes from the transportation of passengers over the special franchises owned by the relator.

(60.) Owing to the manner of the operation of said systems known as the Metropolitan and Central Crosstown systems considered as one railroad system, whereby long and continuous routes of travel have been established, in part over franchises some of which are owned by and some leased by the relator, and in other instances over franchises not owned or leased by the relator, it cannot be determined what portion of its gross earnings the relator derived
703 from the transportation of passengers over its special franchises.

(61.) The consideration of gross receipts by this State board as an element of value, in determining the valuation of special franchises, involves the including in their valuation of the personal elements of ability, business ingenuity, enterprise, management and financial connections.

(62.) The consideration of any matter or circumstance as an appreciating factor in the State board's valuation of the special franchises of the relator made that valuation, to wit, the valuation complained of in this proceeding, materially larger than it otherwise would have been.

(63.) The special franchises of the relator company were assessed at the sum of $1,979,276, which sum the respondents fixed and determined to be the full and true value thereof.

(64.) In the city of New York, no real estate or real property were assessed for the year 1900 at its full value except the special franchises.

(65.) All land, real estate and real property in the city of New York except special franchises were assessed for the year 1900 at a valuation equal to 67 per cent. of their full value.

(66.) The State Board of Tax Commissioners in their official report to the State board of equalization for the year 1900 reported as follows:

"The following table of percentages showing relation of the assessed value to full actual value of 100, and equalization based thereon for the several counties was unanimously adopted * * * New York, percentage, 67."

704 (67.) The counties comprised in the city of New York; the percentages showing the relation between the assessed value and the full value of real estate in each county for the year 1900; the aggregate amount of such assessed value in each of the aforesaid counties for the year 1900; and the full value of such property on the basis of 100 %, are as follows:

County.	Per cent. of value.	Assessed value.	Full value.
New York	67 %	$2,178,605,905	$3,251,650,604
Kings	68 %	609,822,267	893,826,863
Queens	80 %	103,752,600	129,690,750
Richmond	66 %	40,264,692	61,007,109
		$2,932,445,464	$4,333,175,326

(68.) The total assessed value of the real property in all the counties of the city of New York for the year 1900 (the assessment for which year this certiorari proceeding is brought to review) was two billion nine hundred and thirty-two million four hundred and forty-five thousand four hundred and sixty-four dollars ($2,932,445,464). The total full value of the same property was four billion three hundred and thirty-three million one hundred and seventy-five thousand three hundred and twenty-six dollars ($4,333,175,326). The ratio which the assessed value bears to the actual value, in case of such total valuations, is sixty-seven and six-tenths per cent. (67.6 %).

(69.) The aggregate tentative valuation of all the special franchises assessed by the State board for the year 1900 (the assessment for which year this certiorari proceeding is brought to review) was $307,290,806; and the aggregate amount of the final valuations of the same for the same year was $266,202,750.

(70.) The result of the transfer system established by the
705 relator company in conjunction with the Metropolitan Street Railway Company is that passengers are charged much less than the regular fare of five cents for each single continuous ride on any single special franchise owned or leased by the relator, or operated by any other company in connection with the relator company, under said transfer system.

(71.) That by the terms of the grants to the relator under which the relator company now holds and enjoys the two street railroad franchises hereinbefore referred to, it has paid to the city of New York sums and under acts of the legislature as follows:

By act of the legislature of the State of New York, passed May 10, 1869, and constituting chapter 823 of the Laws of 1869, it was provided in substance that the commissioners of the sinking fund of the city of New York should sell at public auction to the highest bidder the right, privilege and franchise to construct, operate and use a railroad through, along and upon Twenty-third street in the city of New York, from the North river to the East river, and that the person or corporation who should offer to pay into the city treasury the largest sum of money for such right, privilege and franchise should, on the payment of the amount of the bid, and upon compliance with certain other terms, receive from the said commissioners a certificate that he or they were entitled to such grant and were authorized to construct, operate and use the same in accordance with the terms of the same; that thereafter, in accordance with the said act, the said right, privilege and franchise were sold

at public auction to one Sidney A. Yeomans for the sum of $150,000,
that being the largest amount bid therefor, which sum was
706 paid by the said Sidney A. Yeomans into the city treasury
prior to July 11, 1872; that thereafter said Sidney A. Yeomans duly assigned his rights in said franchise to the Twenty-third Street Railway Company; in consequence of which a certificate was issued signed by the comptroller of the city of New York, certifying that said Sidney A. Yeomans had so paid said sum and had duly assigned his rights to the said franchise to the Twenty-third Street Railway Company, and that the said company was entitled to the grant, right and privilege mentioned and conferred in and by the aforesaid act passed May 10, 1869, and was authorized to construct, operate and use the same subject to the conditions named in the said act.

(72.) By virtue of the statutes and consents constituting the two special franchise grants of the relator company, copies of which consents are annexed to the return herein and are hereby made a part of these findings, there *was* granted to and became vested in the relator company, or its predecessors in title, rights perpetually to maintain, operate and use a street surface railroad for public use in the conveyance of the public and property in cars upon and along the surface of the streets, avenues and highways in the city of New York described in such grants, and all such rights are now vested in the relator.

(73.) By virtue of the same instruments and the general statutes of the State, there *was* granted to and became vested in the relator, and its predecessors in title, the franchises to construct, maintain, operate and use the street railroad as above described, which franchises are property and constitute interests in perpetuity in the streets.

(74.) The facts proved in this case and the public laws of
707 the State applicable thereto leave no room for doubt that a
provision must be implied in all the contracts embodied in the franchise grants made to the relator company or to its predecessors in title to the effect that the amount which the company or its predecessors agreed to pay in exchange for the franchise rights granted should not be subsequently increased by the exaction of additional taxes or otherwise.

(75.) In the case of each of the street railroad franchises owned by the relator, it was the intention of the legislature in granting the same, and of the grantee of such franchise, in accepting the same, that no other payment or compensation by way of taxes or otherwise should ever be exacted for the franchise so granted than was specifically reserved by the terms of the statute granting the same, in addition to the taxes required to be paid by the laws in force at the time of such grant.

(76.) In the case of each of the street railroad franchises now owned by the relator, The Twenty-third Street Railway Company, a valid and valuable consideration was paid for the same by the grantee of such

franchise, which consideration was sufficient to support the contract embodied in such grant.

(77.) As early as the year 1884, the policy of the State, as evidenced by its legislation, and of the former city of New York, was to prohibit the use of overhead electric conductors for railroad purposes on all the streets where the relator now operates its street railroad. The result of this prohibition was to delay the adoption in the former city of New York of electricity for traction purposes, and to retain there the use of horses or cables for drawing street cars for a number of years after electricity had been substituted for
708 similar traction purposes elsewhere.

(78.) Under the provisions of section 47 of chapter 712 of the Laws of 1899, the tangible property forming part of the various special franchises of the relator is not taxable except upon the assessment made as provided in said chapter by the State Board of Tax Commissioners.

(79.) The rights to construct, maintain and operate street railroads over streets and public places in the city of New York owned by the relator having been constituted either by direct legislative grant, or by consent of the local authorities and property owners in pursuance of the constitution and general laws, and having been followed by actual construction and operation, are property rights that cannot be taken away or diminished by legislative or municipal action, except in the exercise of the police power or right of eminent domain.

(80.) Under the provisions of chapter 712 of the Laws of 1899, the duty of the local assessors in relation to the assessment of special franchises made by the State Board of Tax Commissioners is merely ministerial.

(81.) The action of the local assessors in placing on the tax rolls the assessed valuation of special franchises as made by the State Board of Tax Commissioners is merely ministerial.

(82.) The value of the special franchises of the relator, including the tangible part thereof, is materially less than $1,979,276.

(83.) The special franchises of the relator have no ascertain-
709 able value beyond the sum of $610,346, which sum, it has been stipulated, covers the value of the tangible parts of said special franchises.

(84.) At the time of the adoption of the constitutions of 1846 and 1894, the functions of assessing all real estate in New York State were exercised by the local assessors elected by the people of the respective localities or appointed by the authorities of such localities, and had been so exercised from the beginning of the State government.

(85.) By chapter 712 of the Laws of 1899, the functions of assessing certain real estate throughout the State, theretofore exercised by local assessors, were transferred to a State board appointed by the governor and confirmed by the senate.

(86.) The value of the real estate theretofore assessed by local assessors, the amount of which was so transferred for the year ending the second Monday of January, 1900, was a sum exceeding

ninety-six millions of dollars ($96,000,000), and the amount of intangible property designated as real estate and sought to be made assessable by chapter 712 of the Laws of 1899 was upwards of one hundred and seventy millions of dollars ($170,000,000) in addition, making a total of over two hundred and sixty-six millions of dollars ($266,000,000).

Conclusions of Law.

(1.) The assessment complained of by the relator is illegal in that the State board had no jurisdiction or authority to make the assessment, for the reason that the statute, namely, chapter 712 of the Laws of 1899, under and pursuant to which the State board
710 claims the power and authority to act in the matter and to fix and determine the valuation of the special franchises for the purpose of assessment, is in violation of section 2 of article X. of the Constitution.

(2.) Chapter 712 of the Laws of 1899 is unconstitutional in that it takes away from the local assessors of the city of New York a substantial portion of the functions of assessment which they exercised at the time of the adoption of the constitution of 1846, and at the same time transfers the same to a State board not elected by the people of the city or appointed by local authorities.

(3.) Chapter 712 of the Laws of 1899 is unconstitutional in that it takes away from the local assessors of the city of New York a substantial portion of the functions which they exercised at the time of the adoption of the State constitution of 1894, and at the same time transfers the same to a State board not elected by the people of the city or appointed by local authorities.

(4.) Under the provisions of chapter 712 of the Laws of 1899, the duty of the local assessors in relation to the assessment of special franchises made by the State Board of Tax Commissioners is merely ministerial.

(5.) The action of the local assessors in placing on the tax rolls the assessed valuation of special franchises as made by the State Board of Tax Commissioners is merely ministerial.

(6.) Under the provisions of section 47 of chapter 712 of the Laws of 1899, the tangible property forming part of the various special franchises of the relator is not taxable except under the assessment made as provided in said chapter by the State Board of Tax Commissioners.

711 (7.) Under the provisions of section 47 of chapter 712 of the Laws of 1899, local assessors are prohibited from assessing the tangible property which forms part of any special franchise taxable under said chapter.

(8.) Under the provisions of chapter 712 of the Laws of 1899, the exclusive power of valuing and assessing special franchises is vested in the State Board of Tax Commissioners.

(9.) It was the intention of the legislature, in enacting chapter 712 of the Laws of 1899, that the intangible part of any special fran-

chise should be taxed upon an assessment made by the State Board of Tax Commissioners, or not at all.

(10.) All the parts of chapter 712 of the Laws of 1899 are so mutually connected with and dependent on one another, as to warrant the belief that the legislature intended them as a whole, and that, if all could not be carried into effect, the legislature would not have passed the residue independently.

(11.) The purpose of chapter 712 of the Laws of 1899 is to accomplish a single object only, to wit, the taxation of special franchises upon assessments made by the State Board of Tax Commissioners, and all the provisions of the chapter are necessary to accomplish that object.

(12.) Those provisions of the statute, namely, chapter 712 of the Laws of 1899, which relate to the valuation and assessment of special franchises by the State Board of Tax Commissioners, cannot be eliminated from the statute without essentially changing its scope and operation, and defeating its general purpose.

712 (13.) If those provisions of the statute, namely, chapter 712 of the Laws of 1899, which require the valuation and assessment of special franchises by the State Board of Tax Commissioners, are invalid, the remainder of the statute is not capable by its own terms of being carried into effect, consistently with the intent of the legislature which enacted it.

(14.) The assessment is illegal in that the statute, namely, chapter 712 of the Laws of 1899, and the assessment made pursuant to it, are in violation of section 10 of article I. of the Federal Constitution, in that they impair the obligations of the contracts under the terms of which the relator company and its predecessors in title have for many years held their franchises to construct, operate and maintain street railroads in the city of New York.

(15.) Chapter 712 of the Laws of 1899 impairs the obligation of the contracts embodied in the franchise grants made to the relator company and its predecessors in title, and for this reason is unconstitutional and void.

(16.) The tax authorized by chapter 712 of the Laws of 1899, is to be laid on no property or right but the right to use the streets, and the tangible property in the streets connected with that right.

(17.) The right made taxable by chapter 712 of the Laws of 1899 is not the whole body of the relator's franchises, but merely the special right aforementioned to use the streets and the tangible property in the streets connected with the same.

(18.) The property made taxable by chapter 712 of the Laws of 1899 does not include the general corporate franchises of the relator, nor any of the personal property, nor the good will, of the relator, nor any of its real estate, except its special franchises.

713 (19.) The valuation of the special franchise, which, by chapter 712 of the Laws of 1899, is to be fixed by the State board, is the intrinsic value of the right to use the streets, as granted, and of the tangible property in the streets connected with that right,

and not the value of the use that is made of the right by the owner, nor the value of the profits derived from such use.

(20.) A special franchise has no ascertainable value as property, beyond the value of the tangible property in connection with it.

(21.) The value of the relator's franchises to use the streets cannot be separated from the value of its other property and rights used in its business.

(22.) The assessment is illegal in that the statute, namely, chapter 712 of the Laws of 1899, fails to prescribe any rule, method or principle of valuation for the special franchises sought to be taxed, and for this reason the statute violates the provisions of the Federal and State constitutions, which prohibit the taking of property without due process of law.

(23.) The assessment is illegal in that it is impossible, from the nature of the object taxed, to supply any rule, method or principle of valuation for the guidance of the assessors in valuing the special franchises sought to be taxed, and, for this reason, the statute, namely, chapter 712 of the Laws of 1899, violates the provisions of the Federal and State constitutions, which prohibit the taking of property without due process of law.

(24.) The assessment is illegal because the statute, namely, chapter 712 of the Laws of 1899, is impossible of rational execution, in consequence of its failure to prescribe any rule, method or
714 principle of valuation of the special franchises sought to be taxed, and must therefore be treated as a nullity, and an assessment under it is therefore in violation of both the Federal and State constitutions.

(25.) The assessment is illegal in that the statute, namely, chapter 712 of the Laws of 1899, violates section 24 of article III. of the constitution of New York, in that it fails to state definitely the object to which the tax is to be applied without referring to some other law to fix such object.

(26.) The assessment is illegal because the relator was refused the full and fair hearing to which it was entitled by the constitution of the State and Federal Constitution before final assessment could properly be made against it.

(27.) The assessment is illegal, because the State board refused the relator the full and fair hearing provided for and contemplated by section 11 of article 2 of the tax law, the statute in such case made and provided.

(28.) The assessment is illegal because each special franchise owned by the relator was a special and distinct property, and, for the purpose of assessment and taxation, should be treated as a separate piece of real estate and valued as such; and in treating all the special franchises which were owned by the relator on January 8th, 1900, as a single franchise, and valuing them at a single gross sum, the respondents violated the provisions of the statute, to wit, section 42 of article II. of the general tax law, which required them to value each special franchise subject to assessment in each city, town or tax district.

715 (29.) Each right to construct, maintain and operate a street railroad, which right was owned by the relator on January 8th, 1900, together with the railroad which the relator had then constructed upon and along the streets and public places over which it possessed such right, constituted and constitutes a separate special franchise, as the same is defined in section 2 of chapter 712 of the Laws of 1899.

(30.) Each of said separate special franchises is a separate and distinct parcel of land or real estate, as the same is defined in section 2 of article 1 of the general tax law of this State.

(31.) Each of the separate special franchises owned by the relator company is a separate parcel of real estate, and its valuation for the purposes of chapter 712 of the Laws of 1899 should have been fixed and determined separately by the State Board of Tax Commissioners, if any valuation or assessment whatsoever of such special franchises could have been legally or constitutionally made by said board.

(32.) The operation by the relator of either of the said special franchises in combination with other special franchises did not take from such special franchises so operated the character of separate and distinct pieces of real estate.

(33.) Under the provisions of chapter 712 of the Laws of 1899, if valid, it was the duty of the State Board of Tax Commissioners to fix and determine a separate and distinct valuation of and for each of the special franchises of the relator.

(34.) Each of the special franchises of the relator is subject to the same conditions, liens and encumbrances to which it was
716 subject prior to the time when the title to such franchise became vested in the relator.

(35.) The State board having valued the special franchises of the relator as one, and having fixed and determined one aggregate valuation for the same, the entire assessment entered upon said valuation, if at all valid, became a lien upon each of the relator's special franchises, which lien was prior and superior to the lien of any mortgage which theretofore encumbered any of the relator's special franchises.

(36.) The assessment of the relator's special franchises is illegal, because in determining the valuation of the several special franchises owned by the relator on January 8th, 1900, it was erroneous for the State board, as they did, to consider as factors of value the gross and net earnings of the relator, as such earnings were derived, to a large extent, from the operation of special franchises not owned by the relator, but which were owned by and assessed to other railroad corporations.

(37.) The assessment is illegal because, in determining the valuation of the special franchises owned by the relator company as aforesaid, the board erred in considering the tax rate prevailing on real estate in New York county.

(38.) The assessment is illegal because, in determining the valuation of the several special franchises owned by the relator on January 8th, 1900, it was erroneous for the State board to consider as factors of value the market value of the share stock of the relator, the market

value of the bonds of the relator, and the market value of the bonds of the several corporations which were consolidated as aforesaid into the Metropolitan Street Railway Company.

717 (39.) The aggregate value of the bonds and share stock of the relator at their market prices represented all the property of every kind possessed by the relator and the good-will of its business, and it is impossible to determine from such aggregate value or market prices the value of the special franchises owned by the relator on the date aforesaid.

(40.) The assessment is illegal, because, under the tax law of this State, the State board had no jurisdiction to value any property of the relator, except the special franchises owned by it, and had therefore no right to consider, as they did consider, as a factor of value of the special franchises the fact that the relator owned other valuable property, and was in receipt of earnings derived partly from the use of such other property, and partly from the operation of other special franchises which it held under leases, but which were owned by and assessed to other railroad corporations.

(41.) No basis for the determination of the value of the relator's special franchises is afforded by the consideration of the following matters (or any of them), that is to say: the market value of the share stock of the relator, the market value of the bonds of the relator, the amounts of the gross and net earnings derived from the operation of the system of railways of which the relator's street railways now form a part; the value of all the corporate or other assets of the relator; the value of the good-will of the relator; the rights of the relator to operate cars over the lines owned by other corporations; the earning capacity of the relator and its business methods and skill; the methods of operation and the personal management of the relator's system of railways; the fact that relator's cars are operated over continuous routes owned by other cor-

718 porations and over their special franchises, and that passengers are transferred from one route or line of operation to another for a single fare; the right which the relator possessed to create and operate continuous routes of travel by the union of special franchises, some of which it leased and others of which it owned.

(42.) The State Board of Tax Commissioners, in this proceeding, having testified that, in making their valuation of the relator's special franchises, they considered, as appreciating factors of value, certain facts and circumstances connected with the relator's business, and with its corporate property and obligations and the market value thereof, it follows that their consideration of the said facts resulted in making their valuation larger than it would have been had such facts not been considered by them.

(43.) The assessment is illegal for the reason that it is not the result of the application by the State board of any rule, method or principle of valuation whatever.

(44.) The assessment is illegal for the reason that the State board did not make a separate valuation of the tangible property connected

with the special franchises on the basis of its cost of reproduction, but valued and assessed the tangible property, together with the intangible property, in one valuation and assessment.

(45.) The assessment is unequal in that the special franchises owned by the relator as aforesaid were valued by the State board for the purposes of assessment at a higher proportionate valuation than all other real estate in the city of New York upon the assessment roll of that city, to wit: such special franchises owned
719 by the relator were valued and assessed at such sum as in the judgment of the respondents is the full actual value thereof, while all other real estate in the city of New York is assessed at a sum which in the judgment of the respondents and of the local assessors of that city is 67 per cent. of its full actual value.

(46.) If the assessment is deemed otherwise to be legal, it should be reduced to the sum of $1,326,114.92, that being 67 per cent. of $1,979,276, the amount at which the State board valued the special franchises of the relator.

(47.) The assessment is unequal in that it has been made at a higher proportionate valuation, to wit, that of 33 per cent., than that of other land and real estate in the tax district of New York, and of other land and real estate in the State of New York.

(48.) Even were the assessment reduced by deducting thirty-three per cent. thereof, for the purpose of correcting its inequality, it would still be erroneous for over-valuation, because the State Board of Tax Commissioners, in valuing relator's special franchises, took into account, as appreciating factors of value, facts and elements which it was illegal for them to consider, and which afforded no basis for determining such value.

(49.) Even were the assessment reduced by deducting thirty-three per cent. thereof, for the purpose of correcting its inequality, it would still be erroneous by reason of over-valuation, because the State Board of Tax Commissioners, in valuing relator's special franchises, increased their valuation by considering as factors of value facts which they should have disregarded in determining such valuation.

720 (50.) Even were the assessment reduced to an amount which should bear the same ratio to the present assessment as the average assessment of real estate either in the city of New York or in the State of New York bears to the full value of such real estate in said city or State, the assessment would still be excessive and erroneous for over-valuation, because, in determining it, the State Board of Tax Commissioners increased their valuation of the relator's special franchises by considering elements of value which did not belong to such special franchises, with the result that their valuation included values which belonged exclusively to other property taxable under other laws.

(51.) Even if the assessment (for the purpose of correcting its inequality) were reduced to one million three hundred and twenty-six thousand one hundred and fourteen and 92/100 dollars ($1,326,114.92), that being sixty-seven per cent. of the said State

board's valuation of relator's special franchises, the assessment would still be erroneous for over-valuation.

(52.) The inclusion by the State board in the final valuation on which their assessment of the relator's property has been based of any appreciating element or factor, the effect of which is incapable of pecuniary admeasurement, invalidates the entire assessment.

(53.) It is impossible to measure pecuniarily the effect on the valuation upon which the State board's assessment was based of the various appreciating factors, or any of them, which are found in this report to have illegally entered into the valuation as fixed by the State board.

(54.) The inclusion in the final valuation as fixed by the State
721 board of the elements which are found in this report (of the referee) to have been illegally considered as appreciating factors, has resulted in a material over-valuation of the special franchises of the relator.

(55.) Even were the assessment reduced for the purpose of correcting its inequality, it would still be erroneous because of over-valuation by reason of the fact that neither of the special franchises of the relator has any ascertainable value (beyond the value of the tangible part thereof) apart from the other property, franchises and business of the relator, with which each special franchise has become inextricably interwoven.

(56.) The assessment is further illegal in that both the special franchises owned by the relator company are assessed collectively as one special franchise, instead of each special franchise being assessed separately.

(57.) By virtue of the statutes and consents constituting the special franchise grants of the relator company, copies of which consents are annexed to the return herein, there were granted to and became vested in the relator company, or its predecessors in title, rights perpetually to maintain, operate and use street surface railroads for public use in the conveyance of the public and property in cars upon and along the surface of the streets, avenues and highways in the city of New York, described in such grants, and such rights are now vested in the relator.

(58.) By virtue of the same instruments and the general statutes of the State, there were granted to and became vested in the relator, or its predecessors in title, the franchises to construct, main-
722 tain, operate and use the street railroads as above described, which franchises are property and constitute interests in perpetuity in the streets.

(59.) All the rights, privileges and franchises to construct and operate street railroads granted to the relator or its predecessors in title, together with all exemptions and immunities to which the original grantees of the said rights, privileges and franchises became or were entitled, are now vested in the relator, The Twenty-third Street Railway Company.

(60.) The grant by the State, with the consent of the municipality, to the relator company or its predecessors in title of each of its

special franchises, and the acceptance of the same by the grantee thereof, constituted a contract within the meaning of section 10 of article I of the Federal Constitution, prohibiting States from passing laws impairing the obligations of contracts.

(61.) The facts proved in this case leave no room for doubt that a provision must be implied in all the contracts embodied in the franchise grants made to the relator company, or to its predecessors in title, to the effect that the amount which the relator company, or its predecessors, agreed to pay in exchange for the franchise rights granted should not be subsequently increased by the exaction of additional taxes or otherwise.

(62.) Prior to, or about the year 1890, the policy of the State, as expressed in its legislation, was to prevent a consolidation of parallel street railroad lines; subsequent to such date the policy of the State, as evidenced by new legislation, was changed so as to encourage and promote the consolidation of such railroads and the joint
723 operation of competing street surface lines by a corporate merger, traffic contracts or leases, upon the basis of and in exchange for the extension of transfer facilities over the routes of contracting companies without an increase of fare.

(63.) At all times when the various street railroad franchises owned by the relator were granted, it was a rule of property in this State that neither the State nor the municipality could lawfully impose any further burdens or taxes on such franchises beyond those expressly reserved in the statutes and ordinances granting or consenting to the same and those required to be paid by the laws in force at the times such franchises were granted.

(64.) Each and every of the street railroad franchises owned by the relator was acquired and accepted by the grantees thereof in reliance upon the said rule of property, and the rights conferred by the said franchises are property rights based upon the said rule of property, and were acquired upon the faith of the same, and cannot now lawfully be disturbed by imposing any further tax or burden upon said franchises or any of them.

(65.) The policy of the State, as evidenced by its legislation, has been to require that municipalities, in consenting to the grant of street railroad franchises, should exact the largest compensation possible to be obtained therefor at the time of the consent (consistently with the public convenience and the public interest), due reference being had to the greater value of the franchises applied for in view of increase in population. In furtherance of this policy and pursuant to such legislation, the municipality of the city
724 of New York, in consenting to the grant of the various franchises now owned by the relator, exacted from the grantee of each franchise a compensation which was regarded by the said municipality as, and was intended by both parties to the contract to be, the full measure of the value of the particular franchise thus granted, and which compensation was intended by both parties to be in full discharge of all payments ever to be made for or upon such franchise by the owner or holder thereof by way of tax or

otherwise, except such other taxes, if any, as were required to be paid by laws in force at the time of such grants.

(66.) In the case of each of the street railroad franchises now owned by the relator, a valid and valuable consideration was paid for the same by the grantee of such franchise, which consideration was sufficient to support the contract embodied in such grant.

(67.) A perfected railroad franchise constituted either by direct legislative grant or by consent of the local authorities and property owners in pursuance of the constitution and general laws, or confirmed thereby, especially when followed by actual construction and operations, is a property right that cannot be afterwards taken away or diminished either by constitutional amendment or by legislative or municipal action, except in the exercise of the police power or the right of eminent domain.

(68.) The rights to construct, maintain, and operate street railroads over streets and public places in the city of New York owned by the relator having been constituted by direct legislative grant, and having been followed by actual construction and operation, are property rights that cannot be taken away or
725 diminished by legislative or municipal action, except in the exercise of the police power or the right of eminent domain.

(69.) The railroad franchises owned by the relator cannot be taken away or diminished nor the burdens upon them increased by additional taxation or otherwise, except in the exercise of the police power or right of eminent domain.

(70.) The taxation of the special franchises of the relator under the provisions of chapter 712 of the Laws of 1899 is a diminution of the relator's property in the said special franchises, and is illegal because it is the taking away of property without compensation or due process of law.

Dated New York, July 15th, 1902.

HENRY A. ROBINSON,
Attorney for Relator, 621 *Broadway*,
Borough of Manhattan, N. Y. City.

726 (*Decision.*)

Supreme Court, Albany County.

PEOPLE *ex Rel.* THE TWENTY-THIRD Street Railway Company *against* THE STATE BOARD OF TAX COMMISSIONERS.	Decision. Assessment of 1900. No. 2.

An order of reference having been made herein and entered in the office of the clerk of Albany county on the 18th day of April, 1901, by which it was referred to Hon. Robert Earl, as referee, to

take and report to this court such evidence upon the several issues of fact raised by the petition, writ and return herein as might be adduced before him by either of the parties hereto, with his findings of fact and conclusions of law, and the said referee, pursuant to said order, having filed his report and the evidence and proceedings taken by and before him in the office of the clerk of Albany county on the 15th day of July, 1902, and exceptions having been filed to said report, and this proceeding having come on for a hearing, trial and final determination before the court at a special term thereof, held by the undersigned without a jury,

Now, after hearing counsel for the relator and for the respondents respectively, and findings of fact and conclusions of law having been proposed by the relator, I decide and find *pro forma* as follows:

727 *Findings of Fact.*

1.

That at the times hereinafter mentioned, The Twenty-third Street Railway Company (hereinafter also called the relator) was and still is a street railroad corporation created and existing under and pursuant to the laws of the State of New York, and has its principal office in the city of New York.

2.

That on January 8th, 1900, the relator was also the lessee of two street railroad franchises which were owned by the Bleecker Street and Fulton Ferry Railroad Company.

3.

That the several streets, avenues and public places on which the relator has constructed and is engaged in operating a street surface railroad are set forth and enumerated in Exhibit 1.

4.

That a map of the borough of Manhattan in the city of New York was put in evidence by the relator as Exhibit 1, upon which are correctly delineated the street railroad franchises owned by the relator as they existed on the second Monday, that is the 8th day of January, 1900, and which map is hereby found to be correct and to contain a correct delineation of said franchises and is made a part of this finding.

5.

That on January 8th, 1900, the special franchise owned by the relator embraced two separately granted rights or privileges.

728 6.

That each of said rights and privileges had been separately granted on certain conditions and subject to the performance of the grantee thereof of certain terms, which conditions and terms appear in the schedules and charters annexed to the return herein and are hereby made a part of this finding.

7.

That by the terms of the grants to the relator under which the relator company now holds and enjoys the two street railroad franchises hereinbefore referred to, it has paid to the city of New York sums and under acts of the legislature as follows:

By act of the legislature of the State of New York, passed May 10, 1869, and constituting chapter 823 of the Laws of 1869, it was provided in substance that the commissioners of the sinking fund of the city of New York should sell at public auction to the highest bidder the right, privilege and franchise to construct, operate and use railroads through, along and upon Twenty-third street, in the city of New York, from the North river to the East river, and that the person or corporation who should offer to pay into the city treasury the largest sum of money for such right, privilege and franchise should, on the payment of the amount of the bid, and upon compliance with certain other terms, receive from the said commissioners a certificate that he or they were entitled to such grant and were authorized to construct, operate and use the same in accordance with the terms of the same; that thereafter, in accordance with the said act, the said right, privilege and franchise were sold at public auction to one Sidney A. Yeomans for the sum of $150,000,
729 that being the largest amount bid therefor, which sum was paid by the said Sidney A. Yoemans into the city treasury prior to July 11, 1872; that thereafter said Sidney A. Yeomans duly assigned his rights in said franchise to the Twenty-third Street Railway Company; in consequence of which a certificate was issued signed by the comptroller of the city of New York, certifying that said Sidney A. Yeomans had so paid said sum and had duly assigned his rights to the said franchise to the Twenty-third Street Railway Company, and that the said company was entitled to the grant, right and privilege mentioned and conferred in and by the aforesaid act passed May 10, 1869, and was authorized to construct, operate and use the same subject to the conditions named in the said act.

That prior to January 8th, 1900, the relator, by an instrument in writing dated April 25th, 1893, leased the railroads and railroad routes aforesaid, together with the rights, privileges and franchises to construct, operate and maintain the same and all its property of every kind and description except its franchise to be a corporation to the Houston, West Street & Pavonia Ferry Railroad Company, a street railroad corporation owning and operating a street railroad in the city of New York for the term of 1,000 years.

That thereafter the said Houston, West Street & Pavonia Ferry Railroad Company consolidated with other street railroad corporations owning and operating street railroads in the city of New York and thereby created and formed the Metropolitan Street Railway Company, and on January 8th, 1900, and for some time prior to October 1, 1899, the said Metropolitan Street Railway Company was in the possession of the street railway franchises, railroads and railroad routes aforesaid owned by the relator and was operating the same under and pursuant to said lease.

730 That said Metropolitan Street Railway Company operated the said railroads so leased by the relator in connection with other railroads in the city of New York in its possession, of some of which it was the lessee and of some the owner.

That the said Metropolitan Street Railway Company had formed and created continuous routes of travel throughout said city composed of several separate franchises, some of which were leased and some owned, among which were the special franchises owned by the relator, and operated cars and transported passengers over said continuous routes for a single fare without regard to the fact that some of said special franchises were owned and some were leased by it.

9.

That prior to January 8, 1900, the relator had executed and delivered to Darius R. Mangam, as trustee, a mortgage to secure the payment of its bonds, amounting to the sum of $250,000, which mortgage conveyed to said trustee all street railroad franchises, railways, railroad routes and the real estate and personal property owned by the relator, and also prior to said January 8, 1900, the relator in addition thereto had issued its debenture bonds, amounting to the sum of $150,000. All of the bonds secured by such mortgage and said debenture bonds, amounting in the aggregate to $400,000, had, prior to January 8, 1900, been issued and were outstanding and unpaid at that date.

10.

That by virtue of the statutes of the State, there was granted to and became vested in the relator, and its predecessors in title, the franchises to construct, maintain, operate and use the street railroads as above described, which franchises are property and constitute interests in perpetuity in the streets.

11.

731 That the relator has filed with the State Board of Tax Commissioners all reports required by law or required to be filed by said commissioners. Copies of such reports are in evidence and reference is made thereto for their contents.

12.

That thereafter and on or about the 20th day of March, 1900, the State Board of Tax Commissioners, claiming to act under and pur-

suant to chapter 712 of the Laws of 1899, proceeded to fix and determine the valuation of the special franchises of the relator company at the sum of $2,330,140, and did thereupon make the assessment of such special franchises at the sum aforesaid.

13.

That immediately after making the assessment, the State board gave to the relator company a notice in writing stating in substance that such assessment had been made, and that the total valuation of the relator's special franchises was $2,330,140, and that the State board would meet at its office in the city of Albany on the 10th day of April, 1900, at 10 o'clock a. m., to hear and determine any complaint concerning such assessment.

14.

That the relator company, by its counsel, appeared, pursuant to such notice, at the time and place therein stated, before the State board and requested to be informed by the board concerning and as to what was the amount which said board had determined to be the valuation of the tangible property of the relator company, and as to what was the amount fixed and determined by the board to be the valuation of the intangible franchises, rights and per-
732 missions of the relator company; and as to what was the method, rule or principle, if any, adopted and applied in ascertaining and determining the valuation; but the board refused to give the relator company the whole or any part of the information so requested.

15.

That the relator company thereupon complained of the assessment, and filed with the State board a written statement under oath specifying the grounds of its complaint.

16.

That thereafter and on or about the 30th day of April, 1900, the State Board of Tax Commissioners, still claiming to act pursuant to chapter 712 of the Laws of 1899, finally determined the valuation of the special franchises of the relator company to be the sum of $1,979,276 and on or about April 30, 1900, filed with the department of taxes and assessments in the city of New York a written statement of such valuation as finally fixed and determined by the State board, and at or about the same time gave notice to the relator company that such written statement had been filed with the department of taxes and assessments of the city of New York.

17.

That thereafter the commissioners of taxes and assessments of the city of New York prepared the assessment-rolls of the real and per-

sonal property of the several parts of the city, for the year 1900, and entered thereon, before the final review or certification of such rolls by them, the valuation of such special franchises of the relator company as fixed by the State board, and having annexed thereto their certificate that the assessment-rolls were correct in accordance
733 with the entries of the several books or records in that department, duly verified the same and delivered such assessment rolls to the municipal assembly of New York city, as required by law, on the first Monday of July, 1900.

18.

That within fifteen days after the final completion and filing of the assessment-roll in the city of New York, the relator company applied for and obtained a writ of *certiorari* to review the assessment, pursuant to which writ this proceeding is pending.

19.

That the State board did not make a separate valuation or assessment of each franchise, right, privilege or permission owned by the relator, but made one valuation or assessment covering the special franchise of the relator in the streets of the city of New York, in the borough of Manhattan, and valued the special franchise owned by the relator on January 8, 1900, at the aggregate sum of $1,979,276.

20.

That in making such assessment against the relator, the State board fixed upon a certain figure as covering the value of the tangible and intangible property together, and did not separately arrive at a valuation of the tangible and intangible parts respectively.

21.

That the tangible property of the relator company, the value of which was included in the assessment so made by the State board, had for many years previous to such assessment been entirely assessed by the local assessors in the city of New York.

734 22.

That for the purpose of this proceeding, it has been stipulated on this hearing by the parties that the value of the tangible property connected with the special franchises of the relator company, based upon its cost of reproduction, was, on January 8, 1900, the sum of $610,346.

23.

That the defendants valued the property of the relator at what they deemed its full and fair value, taking into consideration the original report made by it to the board, subsequent supplemental or special reports, the report of the State railroad com-

missioners, the records of the State comptroller's office, the reports of the New York city department of assessment and taxes, and after consideration of information from experts retained by the board and of their confidential appraisers and special agents, and they also had before them the *Poor's Manual* and *Financial Chronicle*, and considered all of the elements, factors and considerations which they were enabled to gather from these sources. They based their valuation of the tangible property solely upon the cost of reproduction, with an allowance for depreciation.

Defendants considered, among other things, in arriving at their valuation of relator's property, the fact that it had the right, partly owned and partly acquired from another company, to operate two continuous lines from the East river to the North river; that it only owned the right to run over one of such lines, and that it leased the other of such rights; that the franchises of the relator was more or less valuable by reason of the acquisition of such right, whether the relator had contracts with another company to run over its lines; and the fact of its having control and operation of a leased line.

735 They had before them and considered a map showing the entire system of the Metropolitan Street Railway Company. They considered the fact that the said street railway franchise of the relator had been leased to and was operated by the Metropolitan Street Railway Company as a part of its system of railroads in the city of New York, the market value of the stocks and bonds of said Metropolitan Street Railway Company for what it might be worth and not as conclusive, or as an absolute measure of valuation. They considered the earning power of the property of the said Metropolian Street Railway Company and the relator company as reported to them by said company. They considered the tax rate in New York county, also the character of the motive power used. They also considered the value of real estate off the line of the road; and assessed the special franchise at what the members of the board agreed was the full and fair value thereof.

That in addition to these facts which were before the commissioners previous to the hearing of relator, the commissioners had, upon and after said hearing before them and considered the statements, evidence, affidavits and arguments upon such hearing for the purpose of arriving at their final conclusion as to the valuation of relator.

That in assessing the special franchise of the relator, and in arriving at the valuation thereof, the defendants did not include in such assessment the valuation of any property except such as is in, above, upon, under or running through the public streets and public places of said city, including the franchises, rights, authority or permission to construct, operate or maintain its foundation, road-bed, substructure, superstructure, with their appliances in, upon, above, under or through said streets and public places. They did not include in such assessment or valuation the value of the right to be or the franchise to be a corporation. They did not include the value

of the good-will of the business carried on by such corpora-
736 tions, nor did they include the value of any property other than that above stated and described as having been included by them. That such assessment as made by such special franchise of the relator includes the value of the tangible and intangible property in the streets of the city of New York, and was arrived at upon consideration of all the facts and circumstances affecting the value of such property, including the use or right to use such streets and public places which the defendants were able to ascertain.

24.

That neither the annual gross nor net earnings derived from the operation of the special franchises owned by the relator can be ascertained, for the reason that said special franchises are operated by the Metropolitan Street Railway Company as a part of its system of railroads as hereinbefore stated, and said special franchises form part only of continuous routes of travel in the city of New York which have been established by the said Metropolitan Street Railroad Company and over which passengers are transported for a single fare.

25.

That the actual and true value of the special franchise of the relator as finally determined by the defendants and, as I find, is $1,979,276, and no evidence was given before me to show that it is less.

26.

That other real estate in the city of New York was assessed at only 67 per cent. of its actual and true value, and therefore, to equalize this assessment with the assessment of such other real estate, there should be deducted from the $1,979,276 the sum
737 of $653,161.08, and there remains the sum of $1,326,114.92 as the value of the special franchise of the relator for the purpose of assessment and taxation under the special franchise tax act.

27.

That the following is a correct statement of the assessed value of real estate in the State and in the city of New York, respectively, for the years hereinafter stated:

Total assessed real estate in State for 1899.....	$4,811,593,059
Do. do. 1900.....	5,093,025,771
Total assessed value all special franchises in State for 1900.....	266,202,759
Total ass'd val. of tang. prop. for year 1899 included in the spec. franchises ass'd in 1900 for whole State.....	96,061,902

Total assessed value of real estate in New York city, by boroughs, for 1899.

Manhattan and Bronx	$2,178,605,905
Kings	609,822,267
Queens	103,752,600
Richmond	40,264,692
Total	$2,932,445,464

Total assessed value of all real estate in the city of New York, exclusive of tangible property included in the special franchise, by boroughs, for the year 1900.

Manhattan and Bronx	$2,369,997,504
Kings	651,383,900
Queens	104,427,872
Richmond	42,723,924
Total	$3,168,533,200

Total assessed value of all special franchises in the city of New York, by boroughs, for the year 1900.

Manhattan	$166,763,669
Bronx	7,272,249
Brooklyn	36,743,057
Queens	6,544,312
Richmond	2,356,064
Total	$219,679,351

738 Total assessed value of the tangible property for the year 1899, included in the special franchises assessed in 1900 for the city of New York, by boroughs.

Bronx	$3,768,600
Brooklyn	18,048,775
Manhattan	50,428,750
Queens	2,935,600
Richmond	1,403,500
Total	$76,585,225

Conclusions of Law.

1. That chapter 712 of the Laws of 1899, is a valid and constitutional enactment, practicable and operative, and that it gave authority to the defendants to assess the relator's special franchise for the purposes of assessment and taxation.

2. That the relator had a hearing and due process of law before the defendants upon the review of their assessment on the 10th day

of April, 1900, and was not there deprived of any of its legal or constitutional rights.

3. That it was lawful to assess as one franchise, the franchise, right, authority or permission which the relator had in the streets of New York, and which it operated as one system.

4. That to equalize its assessment with the assessment of other real property in the city of New York, the relator is entitled to a deduction from its assessment of the sum of $653,161.08, and that the assessment as thus reduced, to wit, the sum of $1,326,114.92, must be taken as the value of the relator's special franchise for the purposes of assessment and taxation under the act above referred to, and that the necessary corrections should be made to that end in the assessment roll and tax books in the city of New York.

I refuse to make the findings of fact and conclusions of
739 law submitted by the relator to me, except as I have found or made them hereinbefore.

I accordingly direct that a final order be entered in this proceeding which shall adjudge that said assessment is excessive and unequal in that other real property in the city of New York is assessed at 67 per cent. of its full value, whereas the special franchise of the relator is assessed at its full value; that the said assessment of the relator's special franchise as made by the State Board of Tax Commissioners and as entered upon the assessment rolls of the city of New York for the year 1900 at $179,276 is excessive and unequal, the equalized valuation of such special franchise being and being hereby fixed at $1,326,114.92; that the said assessment be corrected and reduced to said amount of $1,326,114.92; so as to make it conform to the valuations and assessments of other property upon the same rolls and to secure equality of assessment, and that as so reduced said assessment be confirmed; that upon payment by the relator to the receiver of taxes of the city of New York or other proper officer of the amount of tax due upon said equalized and corrected valuation, less all sums required by law to be deducted therefrom, the said receiver of taxes or other proper officer shall receive the same in full satisfaction of the tax appearing upon the assessment rolls of said city for the year 1900 against said special franchise and shall wholly discharge and cancel said tax.

Dated Albany, July 15, 1902.

D. CADY HERRICK,
Jus. Sup. Ct.

740 (*Exceptions to Decision.*)

Supreme Court, Albany County.

PEOPLE *ex Rel.* THE TWENTY-THIRD STREET RAILway Company *against* THE STATE BOARD OF TAX COMMISSIONERS. } Assessment of 1900, No. 2.

Exceptions to decision.

The relator herein, saving and reserving all objections to the manner and form of the decision, findings of fact and conclusions of law of the court herein not herein precisely and exactly specified, files the following exceptions to the same:

(1.) The relator specifically excepts to the court's 5th finding of fact.

(2.) The relator specifically excepts to the court's 19th finding of fact, and specifically to so much of said 19th finding of fact as finds or implies that all the street railway franchises, rights, privileges or permissions of the relator constitute but one special franchise.

(3.) The relator specifically excepts to the court's 23d finding of fact and to each and every part thereof, and without limiting this exception further specifically excepts to so much of said 23d finding as finds that the respondents considered the market value of the relator's stocks and bonds for what it might be worth and not
741 as conclusive or as an absolute measure of valuation further specifically excepts to so much of said 23d finding as finds that the respondents, in assessing the special franchise of the relator, and in arriving at the valuation thereof, did not include in such assessment the valuation of any property except as is in, above, upon, under or running through the public streets and public places of said city, including the franchises, rights, authority or permission to construct, operate and maintain its foundation, roadbed, substructure and superstructure, with their appliances in, upon, above, under or through said streets and public places; and further specifically except to so much of said 23d finding as finds that the respondents did not include in such assessment or valuation the value of the right to be or the franchise to be a corporation; and further specifically excepts to so much of said 23d finding as finds that the respondents did not include the value of the good will of the business carried on by such corporation, nor did the respondents include the value of any property other than that stated and described in said 23d finding as having been included by them, and further specifically excepts to so much of said 23d finding as finds that such assessment as made by such special franchise of the relator includes the value of the tangible and intangible property in the streets of the city of New York, and was arrived at upon consideration of all

the facts and circumstances affecting the value of such property, including the use or the right to use such public streets and public places which the respondents were able to ascertain.

(4.) The relator specifically excepts to the court's 25th finding of fact, and to each and every part thereof; and further specifically excepts to so much of said 25th finding as finds "that the actual and true value of the special franchise of the relator as finally determined by the defendants and as I find is $1,979,276;" and further
742 specifically excepts to so much of said 25th finding as finds that "no evidence was given before me to show that it is less," both as a finding of fact and as an implied conclusion of law, and relator specifically excepts to such implied conclusion of law as found by the court, and to the whole thereof, as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(5.) The relator specifically excepts to the court's 26th finding of fact, and specifically to so much of said 26th finding that finds or implies that the value of the relator's special franchises is $1,979,276, and that the sum to be deducted is $653,161.08, and that $1,326,114.92 is the value of the relator's special franchises for the purpose of assessment and taxation under the special franchise tax act. The relator, however, does not except to so much of said 26th finding as finds or implies that other real estate in the city of New York was assessed at only 67 per cent. of its actual and true value, and that to equalize the relator's assessment with the assessment of such other real estate a deduction of 33 per cent. should be made from the actual value.

(6.) The relator specifically excepts to the 1st conclusion of law as found by the court, and as to the whole thereof, as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(7.) The relator specifically excepts to the 2d conclusion of law as found by the court, and as to the whole thereof, as against the evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(8.) The relator specifically excepts to the 3d conclusion of law as found by the court, and to the whole thereof, as against the
743 evidence, contrary to the evidence, against the weight of evidence, and unsupported by the evidence.

(9.) The relator specifically excepts to the 4th conclusion of law as found by the court, as against the evidence, contrary to the evidence, against the weight of evidence and unsupported by the evidence, except to so much thereof as finds or implies that the relator is entitled to a deduction from the actual value of its special franchise for the purpose of equalizing its assessment with the assessment of other real property in the city of New York.

(10.) The relator specifically excepts to the court's refusal to find the relator's 3d to 16th, 20th, 21st, 23d, 27th to 35th, 39th to 63d, 67th, 69th, 70th, 72d to 86th, all inclusive, proposed findings of fact, as submitted.

(11.) The relator specifically excepts to the court's refusal to find the relator's 1st to 44th and 48th to 70th, all inclusive, proposed conclusions of law, as submitted.

Dated New York, July 15, 1902.

HENRY A. ROBINSON,
Attorney for Relator, 621 *Broadway, Borough of Manhattan, New York City.*

To John Franey, Esq., county clerk.
To Hon. John C. Davies, attorney-general, attorney for respondents.

744 (*Final Order.*)

At a special term of the supreme court of the State of New York, held in and for the county of Albany, at the county court house, in the city of Albany, on the 15th day of July, 1902.

Present: Hon. D. Cady Herrick, justice.

PEOPLE *ex Rel.* THE TWENTY-THIRD STREET Railway Company *against* THE STATE BOARD OF TAX COMMISSIONERS.	Final Order. Assessment of 1900, No. 2.

A writ of certiorari having heretofore been duly allowed in this proceeding pursuant to provisions of article XI of the tax law as amended by chapter 712 of the Laws of 1899, upon the verified petition of the relator herein to review the action of the State Board of Tax Commissioners in assessing the special franchises of the relator; proof of due service on the said commissioners of the said writ, together with copies of the petition on which it was granted and of the order directing the said writ to issue having been made and filed; the said State Board of Tax Commissioners having made a return to said writ; an order of reference having been made herein and entered in the office of the clerk of Albany county, on the 18th day of April, 1901, by which it was referred to Hon. Robert Earl to take and report to this court such evidence upon the several issues of fact raised by the petition, writ and return herein, as might be adduced before him by either of the parties hereto with his findings of fact and conclusions of law, and the said referee, pursuant to said order, having filed his report
745 in the office of the clerk of Albany county, on the 15th day of July, 1902, and exceptions having been duly filed thereto, and upon the coming in of said report, this proceeding having been brought on for a hearing and trial and final determination before this court, upon due notice to all appearing herein, upon the evidence and proceedings so reported, together with the exceptions to the findings of fact and conclusions of law of the said referee, and after hearing counsel for the relator and respondents respectively, and no further evidence being adduced by either party and further findings of

fact and conclusions of law having been submitted, and this court having duly rendered and filed its decision in writing herein, and the relator having duly filed exceptions thereto;

Now, upon the said petition, order directing said writ to issue, writ, return, order of reference, report, decision, and all the papers and proceedings heretofore had herein, and upon motion of the attorney-general,

It is hereby ordered, adjudged and determined that said assessment is excessive and unequal in that other real property in the city of New York is assessed at 67 per cent. of its full value, whereas the special franchise of the relator is assessed at its full value; that the said assessment of the relator's special franchise as made by the State Board of Tax Commissioners and as entered upon the assessment rolls of the city of New York for the year 1900 at $1,979,276 is excessive and unequal; that the equalized valuation of such special franchise is and is hereby fixed at $1,326,114.92, to which amount the said assessment is hereby corrected and reduced so as to make it conform to the valuations and assessments of other property upon the same rolls and to secure equality of assessment, and as so reduced said assessment is hereby confirmed; that upon payment by the relator to the receiver of taxes of the city of New York or other proper officer of the amount of tax due upon said equalized and corrected valuation, less
746 all sums required by law to be deducted therefrom, the said receiver of taxes or other proper officer shall receive the same in full satisfaction of the tax appearing upon the assessment rolls of said city for the year 1900 against said special franchise and shall wholly discharge and cancel said tax.

Enter.

D. CADY HERRICK, *J. S. C.*

(Endorsed:) "Entered in the office of the clerk of the county of Albany on the 15th day of July 1902."

747 (*Notice of Appeal.*)

Supreme Court, Albany County.

PEOPLE *ex Rel.* THE TWENTY-THIRD STREET Railway Company *against* THE STATE BOARD OF TAX COMMISSIONERS.	Notice of Appeal. Assessment of 1900, No. 2.

SIRS: Please take notice that The Twenty-third Street Railway Company, the relator herein, hereby appeals to the appellate division of the supreme court, for the third department, from the final order in the above-entitled proceeding, dated the 15th day of July, 1902, and entered in the office of the clerk of Albany county on the

10th day of July, 1902, and from so much of said order as confirms the assessment of the relator's special franchise at $1,326,114.92.

HENRY A. ROBINSON,
Attorney for Relator, 621 *Broadway, Borough of Manhattan, N. Y. City.*

To John Franey, Esq., county clerk.

To Hon. John C. Davies, attorney-general, attorney for the respondents.

748 (*Affidavit of No Opinion.*)

Supreme Court, Albany County.

THE PEOPLE *ex Rel.* THE TWENTY-Third Street Railway Company *vs.* THE STATE BOARD OF TAX COMMISSIONERS. | Affidavit of No Opinion. Assessment of 1900, No. 2.

STATE OF NEW YORK, *County of New York*, } *ss:*

Wm. H. Page, Jr., being duly sworn, deposes and says that he is one of the counsel for the relator above named; that no opinion was rendered by Mr. Justice Herrick in this proceeding.

WM. H. PAGE, JR.

Sworn to before me this 16th day of July, 1902.

H. F. AYERS,
Notary Public, Kings County.

Cert. filed in New York Co.

749 & 750 (*Stipulation and Waiver of Certification.*)

Supreme Court, Appellate Division, Third Department.

THE PEOPLE *ex Rel.* THE TWENTY-third Street Railway Company *against* THE STATE BOARD OF TAX COMMISSIONERS. | Stipulation and Waiver of Certification. Assessment of 1900, No. 2.

It is hereby stipulated and agreed, pursuant to section 3301 of the Code of Civil Procedure, that the foregoing are true and correct copies of the order appealed from herein, the notice of appeal and all the papers and evidence upon which the court below acted in

making such order on file in the office of the clerk of Albany county, and the certificate of the clerk to that effect is hereby waived.

Dated Albany, July 22nd, 1902.

HENRY A. ROBINSON,
Attorney for Relator-Appellant.
JOHN C. DAVIES,
Attorney-General, Attorney for Respondents.

751 *Memorandum of Decision.*

Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE TWENTY-third Street Railway Company, Appellant,
against
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. Stearns, Composing and Constituting the State Board of Tax Commissioners of the State of New York, Respondents.

Order appealed from affirmed on the facts and reversed on the law, and assessment vacated, upon opinions in People *ex rel.* Metropolitan Street Railway Company *vs.* State Board of Tax Commissioners, decided this term.

Form of order, if not agreed upon, to be settled by Chase, J.

752 *Order of Appellate Division.*

At a term of the appellate division of the supreme court of the State of New York held in and for the third judicial department, at the court house of the appellate division in the city of Albany on the 6th day of January, 1903.

Present: Hon. Charles E. Parker, P. J.; Hon. Walter Lloyd Smith, Hon. S. Alonzo Kellogg, Hon. Emory A. Chase, Hon. Alden Chester, JJ.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* The Twenty-third Street Railway Company, Relator-Appellant,
against
STATE BOARD OF TAX COMMISSIONERS, Respondents.
Proceedings of 1900. No. 2.

The above-named relator, The Twenty-third Street Railway Company, having appealed to the appellate division of the supreme court for the third judicial department from the final order in the above entitled proceeding entered in the office of the clerk of Albany county on the 15th day of July, 1902, and from so much of said order as confirmed the assessment of the relator's special franchise

at $1,326,114.92, and said appeal having been duly argued by counsel for the relator-appellant and by counsel for the State Board of Tax Commissioners, respondents, and all things having been duly considered, now, on motion of Henry A. Robinson, Esq., attorney for the relator, it is

753 Ordered, adjudged and determined that the order appealed from so far as it confirms the assessment upon the relator's special franchise at $1,326,114.92 be and the same is hereby affirmed on the facts, and be and the same is hereby reversed on the law; and it is further

Ordered, adjudged and determined that said assessment upon the relator's special franchise as confirmed as aforesaid at $1,326,114.92 is illegal and void, and the same is hereby directed to be stricken from the assessment roll.

JOSEPH H. HOLLANDS, *Clerk.*

754 *Opinion of Parker, P. J.*

Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK *ex rel.* Metropolitan Street Railway Company, Appellant, *against* THE STATE BOARD OF TAX COMMISSIONERS, Respondent. } Argued November Term, 1902.

Before Parker, P. J.; Smith, Kellogg, Chase, and Chester, associate justices.

The relator herein seeks to review and vacate the assessment made against it by the State Board of Tax Commissioners under the provisions of the so-called special franchise tax act; and the proceedings are taken under the provisions of article II of the tax law, as amended by chapter 712 of the Laws of 1899. A certiorari was issued, and the issues made by the return thereto were duly referred. Upon the coming in of the referee's report the special term approved and adopted the same, and made an order modifying the assessment in some particulars, and, as so modified, sustaining the same. From such order this appeal is taken.

Henry A. Robinson, (Wm. H. Page, Jr., of counsel), for appellant.
John C. Davies, attorney-general, (J. Newton Fiero, of counsel), for respondent.

PARKER, *P. J.:*

The first question presented by this appeal is whether the provisions of the law which authorize the assessment and tax complained

of are violative of section 2 of article 10 of our State consti-
755 tution. Such act, being chapter 712 of the Laws of 1899, first amends section 3 of the tax law by adding to the subjects of taxation therein specified the right or franchise to construct, maintain or operate upon, over or under the streets or public places of any town or municipality in the State, the tangible property thereon which was already specified in the section as being real estate and therefore assessable. The value of such tangible property, plus the value of the right to maintain and operate the same, is thereafter to be assessed and taxed together, and is denominated in the act as a "special franchise." No criticism is made that this addition to the taxable property named in the section violated any provision of the constitution; but the act further provides that the assessment of such special franchise shall be made by the State Board of Tax Commissioners. That board is required to fix the valuations of all such special franchises wherever found in the State, and to report such assessment or valuation to the proper local assessor, and such local officer is required to place such special franchise upon his roll of the taxable property in his district, at the valuation so received, and the tax is thereupon levied and collected against the same in the same manner and for the same purposes as against the other property on such roll.

This provision it is claimed violates the above cited section of the constitution, for the reason that it deprives the local assessors of a portion of their duties as such assessors, and directs the performance of the same duties by officers who are not chosen by the electors or any authorities of such locality.

In the *Raymond* case (37 N. Y., 428), this section, which is familiarly known as the home-rule provision of the constitution, received judicial construction in its application to the subject of assessment for the purposes of taxation.

756 In that case, the legislature by chapter 410, Laws of 1867, sought to transfer the duties of the commissioners of taxes and assessments for the city of New York, who were officers appointed by local authorities, to a board of five commissioners appointed by the governor, by and with the consent of the senate. At the time of the adoption of the constitution of 1846, such duties of assessment were, and for a long time had been performed by district assessors. By various acts passed in 1850, 1857 and 1859, the legislature had regulated the performance of such duties and changed the officers who were to perform them. But in each instance the selection of such officers was left to local authorities. The act of 1867, however, sought to change the selection of such officers from the city to the State, and it was at once challenged as being violative of the home-rule provision of the constitution. The question came before the court in the case above cited, and it was there distinctly held as follows: That beyond controversy the office in question was *exclusively* a city office. That the duties imposed by the act upon the new board, although broader in their extent, were essentially the same as those exercised by the city assessors in 1846. That the plain intent of the

section of the constitution in question "was to preserve to the localities the control of the official functions of which they were then possessed, and this control was carefully preserved (consistent with the power of the legislature to make needful changes) by restricting the power of appointment of other officers to perform the same functions, to the people, or some authority, of the locality." That, hence, the act of 1867 deprived the people of the city of a right *secured* to them by the constitution, and was therefore void.

This case has never been reversed or modified, so far as I can ascertain, and would, I think be conceded by the respondents in this case, to be a controlling authority in a case where the conditions were in all respects similar.

757 But, in what respect does that case differ, in principle, from the one before us? There the act sought to transfer from local assessors to those appointed by the State authorities, the duty of assessing all the property in the city of New York. The decision is that the legislature was *without authority* to do that thing; that the function of assessing such property was, by the constitution, *secured* to officers selected by the locality. The act before us does not transfer the duty of assessing *all* the property in the various tax districts to the State assessors, but only all of a certain specified kind. Now, if the legislature is without authority to transfer the duty of assessing all, I am at a loss to discover whence it gets the right to interfere with the assessment of any part of such property. The right to have all the property in its locality assessed by officers chosen by itself, was secured to each town and municipality in the State by the constitutional provision in question; and, in my judgment, the legislature has no more power to infringe upon that right by withdrawing from its operation one particular species of property, than it has to withdraw a dozen. It is clear that by the statute before us, the right to assess a distinct kind of property in every district, and in some localities a very considerable portion thereof, is transferred from local to State assessors; and this transfer would seem to be as unwarranted as was the transfer attempted by the statute of 1867, which the *Raymond* case condemned.

It would seem that such decision "absolutely dominates" the case before us, and should control our disposition of the same. And so it does, even in the judgment of the learned jurist whose decision as referee was adopted by the court at special term, and whose opinion is now before us, were it not that he sees a distinction in the fact that the amount of property transferred from local to State assessment is, in every instance, very small as compared with the whole amount

758 of property taxed, and in some localities does not amount to anything. All of the principles decided in the *Raymond* case he seems to adopt, but he sustains the act before us upon the theory that it does not substantially interfere with the home-rule principle, which it is the purpose of this section of the constitution to protect. The argument is, that it does not take away from the local assessors enough of their functions to operate as a substantial invasion of the right of home rule in any locality, and that there-

fore it is not a violation of the provisions of that section. As illustrating and sustaining this claim, he cites many cases in which acts of the legislature have been sustained that, to some extent, transferred from local to State officers certain duties which the local officers might, within the line of their duties, have performed. But in no one of them do I find that the act was sustained upon the ground upon which the referee would sustain this act.

In the *Draper* case (15 N. Y., 532), which is one of the earliest cases to adjudicate upon this section, the validity of a law was in question, which created a new metropolitan police district from the city of New York and three adjacent counties, and which provided for the appointment by State officers of the commissioners therein and abolished the existing police departments of the several municipalities within such district. That case sustained the act, on the ground that the State had authority to create new civil divisions for police purposes and to administer through its own officers the duties and regulations prescribed for the same. It distinctly held that had the act applied to the city of New York alone, it could *not* have been sustained; but it denied that the constitution assumed that the subject of police was localized in the several cities and counties of the State. It held that, "as a political society the State has an interest in the repression of disorder and the
759 maintenance of peace and security in every locality within its limits; and if from exceptional causes the public good requires that legislation, either permanent or temporary, be directed toward any particular locality, whether consisting of one county or of several counties, it is within the discretion of the legislature to apply such legislation as in its judgment the exigency of the case may require; and it is the sole judge of the existence of such causes." Hence it treated the authority of the State upon the subject of police as paramount over that of the localities; and substantially held that, for such reason, no exclusively local function had been interfered with. As to such functions, there was in fact no right of home rule to be preserved to the localities. And this is the principle which pervades and controls all the cases relied upon by the court below. In the *Capital Police* case (36 N. Y., 285) the act was held good upon the same principle; while in the *Albertson* case (55 N. Y., 50) the act was condemned because it was held to apply to the city of Troy only. So in the case *Rathbone v. Worth* (150 N. Y., 459), the act concededly dealt with the subject of police for the city of Albany merely, and a very slight interference with its power of local appointment was condemned.

Upon the same principle, statutes concerning excise (34 N. Y., 657) and the preservation of the public health (37 N. Y., 661) were sustained. So those authorizing the construction of public parks, avenues, and even a court house, by commissioners named by the State, have also been sustained, even though such construction was within the scope of the functions of local officers. *Astor* case (62 N. Y., 567); *McDonald* case (69 N. Y., 362); *Cheritree* case (6 T. & C., 473); *Harlon* case (57 Barb., 383). But the foundation of each decis-

ion has been, that the State had a paramount right to direct the work to be done, and hence could do it through its own instrumentalities.

This is especially made clear by the reasoning of the opinion
760 in the *Oneida Courthouse* case (170 N. Y., at page 108).

My analysis of these cases is made only for the purpose of ascertaining how far they sustain the principle upon which the court below has decided this case. Whatever criticism has been, or may be, made of any of them is quite unimportant to this case, so long as it is apparent that in neither is the decision placed upon the ground that the infringement complained of was not sufficient to substantially imperil the principle of home rule. In many of them the functions of the local officer were entirely transferred, and in each of them the controlling principle has been that the act of the legislature did not invade any right or function that was *exclusively* local in its character. In each instance it was held that the State had the paramount right to control the subject affected by the act, and hence that there was no invasion of local functions. As is said in the very excellent and scholarly brief submitted by the appellant's counsel on this question, it has been the *nature* of the power sought to be conferred upon the State officers that has controlled the decisions of the court.

Whenever the courts were of the opinion that the act did not interfere with any functions that were *exclusively* local, then the act was sustained, even though it *wholly* abolished the local office and transferred its functions to a State or department officer. But whenever the functions affected by the act were exclusively local, whenever they *did not* come within the category of those over which it has always been recognized that the State, for the benefit of the State at large, has the paramount control, then any transfer whatever of such local functions has *not* been permitted. And therein lies the clear distinction between the *Raymond* case and those above cited. It is practically conceded by the referee that the
761 subject of assessment of local property for local taxation is not a subject over which the State has paramount authority. As stated by him, "the assessment of property for the purposes of taxation has always in this State been a function of local officers elected or appointed in the locality where they discharged their duties, and this system of assessment is entrenched in the constitution to secure to the people the home rule to which they had always been accustomed, and of which the people of our race have always been tenacious." Therefore, as against the position taken by the court below no argument is needed to establish that proposition.

A broader and bolder position, however, was taken upon the argument of this appeal. It was there said that no authority can be found for the claim that the assessment of property for local taxation is a function exclusively appertaining to local officers, and that the State has the same power to take from a local officer his duties and transfer them to a State officer as it had to take from the police commissioners of the city of New York their duties and transfer them to officers of a department of the State. In short, that its power over

the subject of assessment is as paramount as is its power over all the several subjects referred to in the cases above cited, and that while the constitution prohibits the State from filling a local office which at the time of its adoption was filled by election or appointment by local authorities, yet it does not prohibit it from abolishing such local office and transferring the duties of that office to an officer of the State at large; that it may take to *itself* the performance of any, or all, the functions of the local office, but it may not name the local officer to perform them; and so far as the question now before us is concerned, this is upon the theory that the State possesses the absolute power to tax, and hence it may take to itself the assessing
762 of property, which is but an incident to the power of taxation. Evidently this theory utterly annihilates the constitutional protection to the principle of home rule for local municipalities, and leaves very little importance or effect to the section in question. It is at variance with many decisions of the courts construing this section and is approved by none. In the recent decision in this court of the *Brenner* case (67 App. Div., 381) it was said, "It must be regarded as well settled that the purpose of the constitutional provision in question is to secure to localities the fundamental right of self-government; that it protects all official duties existing at the time of its adoption vested in local officers, and inhibits the transference of such duties to officers not elected by the electors of the locality or appointed by local authorities; that it is not the officer but the office, the existing duties and functions, to which the protection is extended and which cannot be *transferred to an officer elected or appointed other than in the prescribed manner*." And this case was affirmed in the court of appeals. (170 N. Y., 185.)

Moreover, the *Raymond* case above cited is a direct authority against such view. As shown above, it declares that the plain purpose of the section was to preserve to localities the *control* of the official functions of which they were possessed at the time it was passed, and that "any other construction would render the section in question, when applied to the cities of the State, substantially nugatory." Undoubtedly at that time assessors of the localities were the *only* ones whose duty it was to assess property for local taxation. If the power to make such assessments may be now transferred to a State officer the *control* of the localities over that subject is as much taken away as if it were transferred to a local officer named by the State; and thus the purpose of that section is evaded.
763 Clearly the *Raymond* case proceeds upon the theory that the duty of assessing local property for the purpose of local taxation was exclusively a function of the local assessors; and hence is authority for the claim that such duties may not be transferred by the legislature to *any* officer whatever who is not chosen by the localities themselves.

We are left, then, with the single question whether the views of the court below can be sustained upon principle only.

Its argument is, that the amount of property, the assessment of which is transferred from local to State assessors by this act, is so

inconsiderable a portion of the whole that, as a matter of fact, neither of the localities is "in any '*material*' manner deprived of local self-government." That therefore their home-rule rights are not "substantially" invaded, and hence it does not at all infringe against the constitutional prohibition.

But the question is not whether such transfer affects their home-rule rights or their local self-government "materially" or "substantially," or, as I understand the argument, to an extent sufficient to do them any harm; but whether it does, or does not, amount to a direct and actual invasion of such rights. Beyond controversy, this act takes away from the local assessors the function of assessing a certain kind of property, and transfers it to the State Board of Tax Commissioners, and to this extent makes such board perform the functions of a local officer; and, if we sustain this act, we must sustain their authority to do that very thing. But this is the very thing that the constitution says they may not do. Officers appointed by State authority may not be authorized to perform the functions of an office exclusively local. Clearly, the invasion which we would thus sustain, if repeated, would ultimately transfer the whole function of assessment from local to State officers; and so it would seem that the first invasion is as much a violation of the constitu-
761 tional prohibition, as would be the one that transferred the last remnant of property remaining to the local assessor.

I cannot agree that the principle of home rule is not *endangered* because the *courts* may tell the legislature that it has *intruded* upon it far enough. Such is not the constitutional scheme for its protection. That instrument declares what the legislature may not do. They may not transfer the functions of a local office to State officers. If an act of the legislature attempts to do that, presumptively it is a dangerous invasion of the home rule principle—certainly it is a prohibited one. It is a question of authority on the part of the legislature. Concededly, it would not be authorized to so transfer, by other acts, many other specified kinds of property. Concededly, the time would come when, to save to localities their home-rule rights, the courts must hold an act to be unconstitutional, that in itself attempts to do no more than this act does. In my judgment, both acts would be equally unauthorized.

It is suggested that so much of the "special franchise" as consists of the mere right to operate the tangible property in streets and public places has never heretofore been the subject of taxation, and that as to such new property the act in question, by depriving the local officers of the right to assess it, takes no right from them that they ever had before, and hence the principle of home rule is not invaded.

But it has been the duty of local assessors, ever since the office existed, to assess all property in their district that was liable to taxation, and they were the sole and only officers upon whom such duty was imposed. The legislature from time to time, as new species of property have come into existence, has imposed the burden of taxation upon them; yet it did not need an act of the legislature

to enable the assessors to assess such new property. That duty devolved upon them as soon as the property was declared taxable, by virtue of the long existing and well-recognized function of
765 their office, and it is this very duty of assessing *all* the property in a locality upon which the legislature shall impose the obligation of paying a local tax, that the localities insist should be exercised by officers chosen by themselves. The functions of the office are neither enlarged by an addition of property to the tax list, nor are they diminished by a removal of property from that list. Undoubtedly the legislature has the power to do either, but the functions of the assessors' office remain the same. The right and the duty of the assessors to assess whatever property in their district the legislature shall declare taxable for local purposes is the long-existing and assured function of that office which is sought to be preserved. Therefore, when the legislature deemed it wise to add to the taxable list the so-called "special franchise," the duty of assessing it devolved at once upon the local assessors. Its creation at once brought it within the scope of their official duties. By virtue of the functions of such office it became the duty of the assessors to assess it. It is true that the assessors have never heretofore had the opportunity of assessing such property. It has never been made taxable and so brought within the scope of their duties, but their right and duty to assess, now that it has been made taxable, has always existed, and by appointing another officer to perform that duty the act in question directly invades the functions of such office and attacks the principle of home rule.

Moreover, a considerable portion of the "special franchise" consists of tangible property that has long been assessed by the local officers. In the city of New York alone it amounts to something over seventy-six million dollars. All such property the law in question with-draws from the assessment by local assessors. It is argued that
766 such property is a mere adjunct to the "franchise or right to use it," and that as the duty of assessing such right may be taken away, the duty of assessing its adjuncts must go with it. As said above, this is a question of power in the legislature, and I am unable to understand how that body gets the power to withdraw the tangible property from local assessment by merely requiring it to be assessed with the intangible right to use it. It cannot do indirectly what it may not do directly. It has no more power to add it to intangible property, and so withdraw it from local assessment than it has the power to withdraw it directly from such assessment.

I am forced to the conclusion that so much of the act in question as provides for the assessment of a special franchise by the State Board of Tax Commissioners is unconstitutional and void.

I am not unmindful of the importance of this question. The great interest which the taxpayers of the State take in this effort to subject to the burden of taxation a very large amount of property, which undoubtedly is of immense value to its owners, and the disappointment which will naturally accrue through its failure to them and to those legislators who evidently adopted this plan as

the one best calculated to protect alike the owner and the public, is fully appreciated by me. But this court does not enter as a pioneer upon the consideration of this question. Every principle involved in it has been settled by the court of appeals, and we may do no more than recognize and enforce such principles in their application to this case. As stated above, in my judgment the decision in the *Raymond* case absolutely dominates this case.

767 *Opinion of Kellogg, J.*

KELLOGG, *J.*:

The question of the constitutionality of the so-called "special franchise" amendment of the general tax law is approached with no little hesitancy, owing to its importance; also to the fact that it has been discussed and determined by an able jurist, the learned referee appointed herein, and the further fact that the question is avowedly on its way to the court of appeals, where alone the question can be finally answered. Counsel on both sides have very ably and with evident conviction argued this question before us and insist upon the deliberate judgment of this court unbiased by what has gone before or what may come after, and we are therefore called upon to express our independent convictions and briefly state the grounds upon which they are based.

The learned referee has held that assessing property for the purpose of taxation under the general tax laws of the State is a local function and can be exercised only by local assessors elected by the electors of the locality or appointed by the local authorities. He says:

"The assessment of property for the purpose of taxation has always in this State been a function of local officers elected or appointed in the locality where they discharged their duties, and this system of assessment is entrenched in the constitution to secure to the people the home rule to which they had always been accustomed and of which the people of our race have always been tenacious."

This must mean that the legislature has not the power to take from the local assessors this function and settle it upon an individual or body appointed by the legislature. It is not a function which the legislature has power to change from a local to a State function.

768 This conclusion of the learned referee is supported by the court of appeals in *People v. Raymond* (37 N. Y., 428) and by every case in that court in which the question of assessment of property for purposes of general taxation has directly or indirectly arisen. The organization tax and franchise tax levied by the comptroller upon corporations are held not to be taxes, but charges by the State upon the right to do business in a corporate capacity, a privilege the State may give or take away. So with the inheritance tax: it is held not to be a tax upon property, but a charge upon the succession, also a right the State may give or take away. (*Matter of estate of Swift*,

137 N. Y., 77.) It has never been claimed that valuations made by the comptroller or by his appointees or by any appointee of the State in such cases, for the purpose of fixing the sum to be charged for the enjoyment of these State privileges, was a local function. The State has seen fit to base its claim against certain corporations upon a valuation of capital employed in the State. It might have demanded a share of its earnings instead, and it might, without valuation, have taken a share in kind of the property of a deceased person as the price of transmission of the remainder to the heir, devisee or legatee. I do not therefore see how much incidental valuations for special purposes have any bearing upon the question before us.

Speaking generally of the home rule which the constitution essays to protect, the courts in many instances have undertaken to define, distinguish and point out what is *not* a local function as contemplated by the constitution; but as to the matter of assessment of property for general taxation they have uniformly held that to be a local function. The class of cases in which the courts have held the function to be exercised not to be exclusively local are such as relate to the exercise of police powers, and as instances of these are *People v. Draper* (15 N. Y., 532), *People v.*
769 *Pinckney* (32 N. Y., 377), *Board of Health v. Heister* (37 N. Y., 661), *Board of Excise v. Barrie* (34 N. Y., 657), *Astor v. The Mayor* (62 N. Y., 567), *People ex rel. Kelmer v. McDonald* (69 N. Y., 362), *People ex rel. v. Cheritree* (6 T. & C., 473), *Haulon v. The Supervisors of Westchester* (57 Barb., 383), *City of Syracuse v. Hubbard* (64 App. Div., 587), *The People ex rel. v. The Board of Supervisors of Oneida Co.* (170 N. Y., 105).

In these cases the court in every instance professed to see that the principle of home rule contemplated by the constitution was not involved for the reason that the function sought to be exercised was not local in such a sense as to deprive the State from its unlimited exercise. In some cases it is true that the prevailing opinion of the court conveys the impression that local self-government as a principle, so far as recognized by the constitution, is a sort of nebula with limitations as uncertain, unstable and elusive as the tail of a comet (*Matter of Allison, com. of jurors*, 172 N. Y., 421), but all, nevertheless, declare that the constitution does recognize the principle and protects it against legislative encroachment.

It will be of little worth to here state the process of court reasoning by which conclusions were in those cases arrived at. We are only concerned with the uniform finding of the court in each case that the function sought to be exercised by the State was not a local function and the home rule principle embedded in the constitution was in no manner or degree invaded. None of these cases excuses the conclusion arrived at on the ground that the invasion of the field protected by the constitution was slight or not substantial. None of them claims that there is a difference between a small invasion and a great one in determining whether an act of the legislature is constitutional or otherwise. If the theory of "substan-

tial invasion" is the proper theory in determining whether or
770 not there has been an unlawful violation of the constitution, the courts might well have held in the *Brenner* case (*Matter of Brenner*, 170 N. Y., 185) that the act considered was constitutional because there was left to the home rule the power of appointment and election of so many other officers that the taking away of a single office was not a substantial infringement.

It seems to me that the question of the constitutionality of the act we are considering hinges wholly upon the question as to whether or not the assessment of property for general taxation is an exclusively local function. If it is conceded to be, or is determined to be an exclusively local function and, as said by the referee, is a "system of assessment entrenched in the constitution to secure to the people the home rule to which they have always been accustomed and of which the people of our race have always been tenacious," then it must be the duty of the courts, until the people shall change the organic law, to see that these secured rights are not unlawfully invaded. It matters not, it seems to me, how little or how great may be the invasion proposed. Every little violation of the constitution is as inexcusable as is a larger violation. Considerations of convenience or better service have no place in the discussion or in the determination of this question. If we were authorized to hew away the constitution every time it binds and so make it run in accord with the legislative idea of public needs we might then take into account the good and the bad which might result from the change.

The learned referee has found that the tangible property heretofore assessed by local assessors throughout the State amounts to $876,585,225. The assessment of this is, by the legislative amendment to the general tax law, taken from the local assessors and the function transferred to a State board. No one can deny that this is a
771 palpable violation of the constitution, at least in some degree. It may not be a very large invasion but it is a material invasion, for I assume that every invasion, if plainly an encroachment, however small it may be, is material to those who give heed to a constitutional inhibition. The excuse for transferring this power to assess the tangible property on, under and over the public streets and places, is based upon the claim that this property is inseverable from the franchise, the intangible property. That it is not inseverable for the purpose of valuation is plain. That is manifest from the findings of the referee who has ascertained from the testimony of the State board of assessors the value of the tangible and intangible separately. It is also plain from the approved method of assessment adopted by the State board, viz., appr-ising first the whole property of the corporation and deducting therefrom the value of all the tangible property of every name and kind owned by the corporation, estimated on the cost of reproduction, and taking the result as the net valuation of the intangible, or franchise. It is not inseverable either for the purposes of enforcing payment of the tax. The franchise may be sold without the tangi-

ble property on, under or over the streets. Its value without the tangible would be the value of both less the cost of reproduction of the tangible; so the State board of assessors have determined, and both are separately valuable. The tracks of a street railway are no more essential to a profitable use of the franchise than are the power houses which furnish the power and which are not assessed with the intangible property; both the tracks and the power houses as well as the rolling stock may be replaced. The case cited (*People v. O'Brien*, 111 N. Y., 47) to show that "the franchises would be of no value without tangible property to operate them and so they are inseparable" was based upon *Gue v. Tide Water Canal Co.* (24
772 How. U. S., 257). That was a case where the sale of a canal by piecemeal was sought to be enjoined in equity. A levy had been made on the locks of the canal, the toll house and land surrounding the outlet locks, all essential to the uses of the canal. The court held that to sell a canal lock would destroy all value in the canal itself and would be of no value to the purchaser, hence the sale was enjoined. It is obvious that a canal so far differs from a street railway as to make the case cited wholly inapplicable. The tracks of a railway may be removed, but the lock of the canal could not be. There could be no replacement of the property sought to be sold appertaining to the canal, hence a sale would destroy the franchise. This cannot be the case as to any of the property contemplated to be assessed by the amendment of the tax law under the name of special franchise.

The assessment by a State board of the franchises themselves—the intangible property of a corporation as defined by the amended act—presents perhaps another question. This property is not new property coming to the locality but has always existed there though it has never been locally assessed. To assess this property judiciously or by the method adopted by the State board the local assessors in most cases would need to go beyond their precincts. The property can hardly be said to be localized. For instance a street surface railway, a telegraph, telephone or pipe line, which runs through several incorporated villages and on the highways of intervening towns, must possess a franchise from each municipality. The value of these franchises separately considered might be very little but the value combined might be very great. The right to run cars on the highways of a town could only be valuable as connected with the right to run through the other municipalities. These franchises therefore are only links in a chain. The chain may have great value but the links have no value except for their being component
773 parts of the chain itself. It is obvious that to give a proper value to any link the value of the entire chain must be first ascertained and then an approximate apportionment would not be difficult. But the value of the chain largely depends upon the earning capacity for the time being of the entire property of the corporation used to do the business which the franchises permit to be done, and the value of the chain of franchises, ascertained in the mode adopted by the board of assessors—and no better mode has been

suggested—requires a valuation of the entire corporate assets and a separate valuation of all the tangible property in each municipality and elsewhere situated, and then by a process of elimination the value of all the franchises together may be determined. It is possible that this might be done by local assessors, but in doing it they would be exercising something more than the usual local function of their offices. The appr-isement by local assessors of property in another municipality would, if permissable, be a function never before exercised. They could not be protected in so doing by any principle of home rule. And if this is what would be required of them I do not see how their local functions could be disturbed or diminished by the appointment of a State board to make this assessment. The property to be assessed is not in its nature localized in any one taxing precinct. It is not property over which the local assessor has ever exercised jurisdiction. In some cities and in some other municipalities it may be that the entire corporate property including its franchises are located within the municipal limits, but such cases make the exceptions rather than the rule.

I advise a reversal, and that the assessment be set aside, on the ground that the amendment to the general tax law creating a State board of assessors and giving them power to assess the tangible property on, under and over streets and public places is an invasion of the functions of local assessors and in this respect is a violation of the constitution.

774 *Opinion of Smith, J., Dissenting.*

SMITH, *J.*, dissenting:

The legislative act, the constitutional warrant for which is here challenged, was passed in May, 1899. By its provisions a new species of property was added to the property theretofore taxable by law. This new species of property was the franchise, right or permission granted by municipalities to use the public highways and public places within the State. This franchise, right or permission was defined by the statute to include the tangible property of the person, copartnership, association or corporation, the owner of the franchise itself, which was used upon the public way. It was provided that this tangible property should be taxed as a part of the special franchise; that the special franchise as thus defined should be assessed by the State Board of Tax Commissioners, and their assessment as certified should be entered by the assessors or other officers of the various localities in which said franchises existed in the proper column of the assessment roll. One of the grounds of the relator's challenge is that this act violates the home rule provision of the State constitution as found in section 2 of article 10 of the constitution of 1894. That provision of the constitution reads as follows: " * * * * All city, town and village officers, whose election or appointment is not provided for by this constitution, shall

be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed, as the legislature may direct."

775 The contention of the relator is that this constitutional provision is violated by giving to the State Board of Tax Commissioners the assessment, first, of the franchise, and second, of the tangible property in the street; which, by the act, is made a part of the special franchise subject to assessment by the State officers.

That the legislature might properly give to the State board the assessment of the franchise seems to me of undoubted right. The constitution provides that "all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed, as the legislature may direct." This provision is a clear index of the constitutional purpose to protect the localities in the home rule which existed at the time of the adoption of the constitution, and to that extent only. All offices thereafter created are to be filled as the legislature may direct. By this act, the legislature has in effect created a new office—a franchise tax assessor; and to the extent of the assessment of the franchise, with duties not existing at the time of the adoption of the constitution. These duties, too, are distinct from and independent of any then existing duties of local officers. An intangible franchise has never been the subject of assessment by local assessors. This is held by the referee below. See *People v. Barker*, 152 N. Y., 417; *People v. Com'r of Taxes*, 104 N. Y., 240. Most franchises are enjoyed in connection with franchises from adjoining municipalities which have a value in their union, the value of which separately, however, is uncertain and practically undeterminable except by arbitrary apportionment. To assess these franchises, access must be had to the books of the corporation and to other data which it would be difficult if not impracticable to give to the assessors of every tax district in which the franchise existed. The duty, therefore, of assessing these in-

776 tangible franchises, is, as I say, distinct from the duty of assessment of real and personal property. The fact that this franchise is, by the statute termed real estate, and that the local assessors were, at the time, empowered to assess all real and personal property within their tax district, does not affect the situation. Whether it be called real estate, personal property, or neither, is a mere matter of form. The intent of the legislature is plain to make taxable another species of property which had not theretofore been taxable, and to appoint State officers to assess the valuation of the same. But it is immaterial whether a new office has been created or new functions have been added to an old office. In either case existing home rule is not invaded by the assignment of such functions to legislative appointees. There is preserved to the locality every function possessed by it at the time of the adoption of the constitution.

People v. Pinckney, 32 N. Y., 382; *City of Syracuse v. Hubbard*, 64 App. Div., 589. In my judgment, therefore, the right seems clear, both within the letter and within the spirit of the constitution to give to the State board of assessors the power to assess the intangible franchise. See *People v. Draper*, 15 N. Y., 532; *People v. Wells*, 172 N. Y., 421.

By this statute, however, the tangible property of the corporation within the street, used in connection with the intangible franchise, is made a part of the special franchise which the State officers are empowered to assess. The constitutionality of this provision presents a more serious question. This tangible property amounts to upwards of ninety millions of dollars within the State. It has heretofore since its creation been assessed by the local assessors. It was so assessed at the time of the adoption of the constitution. By this act, this local function, existing at the time of the adoption of the constitution, has been taken away from the local officers and given
777 to the State board. By what rule of construction can this be justified?

Chapter 564 of the Laws of 1865, conferred upon the commissioners of Central park, appointed by the central power, the exclusive care, management and control of portions of Sixth avenue and certain other streets in the city of New York for the purpose of regulating, grading, and otherwise improving the same. In *Astor v. The Mayor*, 62 N. Y., 567, that act was questioned as violating the home rule provision of the constitution, by transferring to officers appointed by the central power, functions theretofore always discharged by local officers elected or appointed in the locality. This act was held constitutional and the rule as stated in the headnote is as follows: "The constitutional provision does not prohibit the legislature from clothing officers appointed by it for the carrying out of a public improvement with power to perform acts which have an especial relation to and connection with such improvement, simply because the power to perform such acts was, at the time, of the adoption of the constitution, vested in local officers elected by the people." In discussing that act, Justice Miller, writing for the court, says: "It would be carrying the doctrine of non-interference with local officers far beyond any reported case to hold that in no case whatever could any of the powers existing in a local officer at the time of the adoption of the constitution be taken away without violating the provision cited." In *People v. Draper*, 15 N. Y., p. 543, Denio, J., in writing of this provision of the constitution says: "If we were to establish the prin-ple that the legislature can never reduce the administrative authority of counties, cities and towns; can never resume in favor of the central power any portion of the jurisdiction of those local divisions, or change the partition of it among them, as it existed when the constitution was adopted, we should, I think, make an impracticable government."

778 The intimate relation of the tangible property in the street to the intangible property to which it is an incident is seen at a glance. For many purposes they are legally inseparable. In *People v.*

O'Brien, 111 N. Y., 471, the court in its opinion, says: "In the former class has been held that at common law real estate acquired for the use of a canal company could not be sold on execution against the corporation separate from its franchise so as to destroy or impair the value of such franchise. *Gue v. Tide Water Canal Co.*, 24 How. U. S, 257. And by parity of reasoning, it must follow that the tracks of a railroad company and the franchise of maintaining and operating its road in a public street are equally inseparable in the absence of express legislative authority providing for the same." In *Syracuse Water Co. v. City of Syracuse*, 116 N. Y., 182, the opinion reads: "The corporate rights and the corporeal means of their exercise therefore constitutes, as it were, a single body, consisting of property corporeal and incorporeal. Both the power and the means of exercising it are essentially united and upon such union is dependent the enjoyment as well as the practical value of the franchise." Citing *People v. O'Brien* and *Gue v. Tide Water Canal Co.* In the case of *Gue v. Tide Water Canal Co.*, upon which both of these opinions rest, a creditor of a canal company had levied an execution upon a house and lot, some locks in the canal, and some adjoining building lots, all the property of the canal company and necessary for the conduct of its business. It was there held, that because a sale of the tangible property without the franchise would result in a sacrifice of the property, equity would enjoin the sale in behalf of creditors and stockholders of the corporation and leave the creditor to an equitable action for a sale of the whole property, including the franchise, upon which the proceeds could be equitably distributed. This case, and the authorities based thereon, are distinguished by Justice Kellogg in
779 his opinion, in which he says: "It is obvious that a canal so far differs from a street railway as to make the case cited wholly inapplicable. The tracks of a railway may be removed but the lock of a canal could not be; there could be no replacement of the property sought to be sold appertaining to the canal, hence a sale would destroy the franchise. This cannot be the case as to any of the property contemplated by the amendment of the tax law under the name of special franchise." This distinction of Justice Kellogg is clearly overborne by the authorities. The principal of the case of *Gue v. Tide Water Canal Company* has been applied by the courts with equal force to the tracks and equipment of a railroad which cannot be sold separately from the franchise itself. See *Hammock v. Loan and Trust Co.*, 105 U. S. 77; *Buncombe County Commissioners v. Tommey*, 115 U. S., 122; *Kittell v. Augusta T. & G. R. Co.*, 65 Fed. Rep., 861. In that case the opinion in part reads: "It further appears that said sale covers all the construction plant, tools and construction material belonging to said corporation. In such circumstances, a creditor cannot dissever from the franchise property essential to its useful existence." *In National Foundry and Pipe Works v. Oconto Water Co.*, 52 Fed. Rep., 43, where a specific lien was given to a materialman upon a plant and franchise of a water company, it was held that they "cannot be separated by judi-

cial sale because of their public use." The judge, in writing the opinion, says: "The structure here is of the class of which canals, street railways, railroads, telegraph, telephone, electric light and gas plants are examples, *and can only be dealt with as an entirety.*"

But it is urged that the tangible and intangible are not inseparable for the purpose of assessment. Possibly they are not absolutely inseparable.

As shown by the evidence the value of the intangible franchise must be determined by taking the value of the whole property, tangible and intangible, and deducting therefrom the
780 value of the tangible. Thus the determination of the value of the tangible property is a prerequisite to the valuation of the intangible. Their values and use depend upon each other. Those values thus interdependent are given to the State board to determine. They are therefore reasonably connected for the purpose of assessment and taxation. And this is all that is necessary to authorize the legislature to attach the tangible to the intangible property for this purpose.

In the *Astor* case, above cited, the several avenues, jurisdiction of which was taken from the local assessors and given to the State officers, were outside of Central park, and not within the jurisdiction of the park commissioners. These avenues might have been left to the local officers to improve. There was no absolute necessity that they be transferred to the park commissioners who were appointed by the central power. Nevertheless, by reason of their intimate relation and connection with the park and with the scheme of park improvement, the legislature was held authorized to take from the local officers functions which had theretofore been local functions, and transfer them to these State officers. If, as part of the park improvement, the legislature had thought best to give to the park commissioners the permanent control of the streets surrounding the park, I apprehend that the right to do so would be recognized by the courts as one reasonably connected with and incidental to the scheme of park improvement which the legislature was authorized to adopt and execute.

Nor do I find any authorities which conflict with the conclusion reached. The learned presiding justice deems this case controlled by the case of *People v. Raymond*, in 37 N. Y., 428. That case simply holds that the legislature has no right to abolish the office of commissioner of taxes and assessment of the city and county of New
781 York, and to transfer the duties of that office to one appointed by State authority. It does not hold that his every function is inviolate, and that no part of his duties may be transferred to State officers if such be reasonably necessary as incidental to some plan which the legislature lawfully seeks to accomplish. The office of commissioner of highways cannot be abolished and his duties transferred to an officer appointed by the State. That office, equally with the office of commissioner of taxes of the city of New York, is one within the protection of the constitution. Nevertheless, it has been frequently held that some of the functions of the office of commissioner of highways may be taken from it and exercised by

the State; and in the *Astor* case, an act taking from him certain functions was justified because they were incidental to the State plan of park improvement in the city of New York.

In the referee's opinion are cited many instances where certain functions are taken from local officers while the offices themselves are concededly protected under the constitution from destruction by the legislature.

The learned referee, before whom this case was originally tried, has admonished us of certain rules of construction by which we must be guided in the determination of this question. He says in his opinion: "There is also a rule many times announced by the judges that the legislative will is not to be thwarted as in conflict with the constitution unless such conflict is clear and undoubted; and that whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution and give it the force of law, such construction should be adopted. The legislature has supreme legislative power except as such power is limited in the Federal or State constitutions; and we must be able to point to some unmistakable constitutional limitation before such power can
782 be curtailed. A further rule must, however, be observed, that a thing within the intent of the constitution, if that intent can be gathered from the instrument itself considered in all its parts or from the history connected with it of which a court can take notice, is, for all purposes, to be regarded as within its words and terms, and that the plain purpose of the constitution will not be thwarted by a too close adherence to its letter."

Guided by these rules of construction, we must not lose sight of the fact that what is protected by the constitution is the local office and not each separate function thereof. It may be that the legislature would not have power arbitrarily to take from a local officer some of his regular functions, however small. The argument is not without force that a slight arbitrary invasion might be followed by another until the substance of the office is gradually taken from the locality. Where, however, the functions of a local officer are left substantially unimpaired, to take from him certain of his functions and give them to State officers entrusted with the execution of a lawful State purpose, where the transfer is of *functions reasonably incidental to the fulfillment of that purpose*, in no way offends as against the constitutional prohibition. To hold otherwise and to rule that no single function may ever be invaded would materially cripple the power of the State in the institution of public improvements, and would, in my judgment, be a limitation never intended by the framers of the constitution. The legislature has transferred to State authorities the capital execution of criminals. Those functions have been taken from local constitutional officers and given to State officers. To question the constitutional right to accomplish this purpose would be generally recognized as quibbling over the constitutional restriction. The constitution should receive such liberal construction as will protect the people in the
783 rights intended to be reserved, and at the same time render possible the growth and prosperity of the State. The limitation

which the majority of the court have here found is at the most an implied limitation, unwarranted, as I think, either by authority or by any reasonable conception of the intent of the framers of the constitution. I am impressed with the conviction that to hold this law invalid is to pervert the will of the people of the State, as written in their fundamental law.

784 *Opinion of Chester, J., Dissenting.*

CHESTER, *J.*, dissenting:

The special franchise tax law (so called) chapter 712, Laws 1899, amended the tax law (chapter 908, Laws 1896) so that the terms "land," "real estate" and "real property," as used in the tax law, should include not only all surface, underground or elevated railroads, but "the value of all franchises, rights or permission to construct, maintain or operate the same in, under, above, on or through, streets, highways, or public places;" and also the "value of all franchises, rights, authority or permission to construct, maintain or operate, in, under, above, upon or through any streets, highways, or public places, any mains, pipes, tanks, conduits, or wires, with their appurtenances, for conducting water, steam, heat, light, power, gas, oil, or other substance, or electricity for telegraphic, telephonic or other purposes." The amendment further provided that, "a franchise right, authority or permission specified in this subdivision shall for the purpose of taxation be known as a 'special franchise.' A special franchise shall be deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place, or public waters in connection with the special franchise. The tangible property so included shall be taxed as a part of the special franchise." It was also provided in the amendatory act that, "the State Board of Tax Commissioners shall annually fix and determine the valuation of each special franchise subject to assessment in each city, town, village or tax district." The amendment also required the board to return its valuation to the local authorities to be included in the local assessment rolls, and required the local authorities to enter the valuation of the special franchises, so fixed by the State board, in the proper place in the local assessment rolls.

785 The act did not interfere with the office of assessors or other local officers charged with the duty of making assessments. The only power taken from such local officers was the power to assess the tangible property in the streets which was defined by the law to be, and to be taxed as, a part of the special franchise.

The most important question in the case is whether the legislature had the power under the constitution of the State to take this function from the local assessors. That the legislature had the power to commit to the State Board of Tax Commissioners the function of assessing the intangible property constituting a part of the special franchises is not, I think, open to serious question. Such intangible

property was made taxable for the first time in this State by the amendment and the legislature had the undoubted right to commit its valuation for the purposes of taxation to any agency it might choose without the impairment of any functions of local officers, because no local officer ever had any power or authority over property of that character for the purposes of taxation.

As to whether or not the legislature could commit to the State Board of Tax Commissioners the power to value the tangible property in the streets forming a part of these special franchises is a more serious matter. My examination of this question has led me to a different conclusion from that reached by some of my associates and I will, as briefly as I may, state the reasons for my conclusion.

The home rule provisions of the State constitution which is brought in question here is found in section 2 of article X. and is as follows:

"All county officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county authorities, as the legislature shall direct. All city, town and village officers, whose election or appointment is not provided
786 for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers, whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct."

The office of assessor is not mentioned in this section, nor are the functions of any local officer defined therein. While this section expressly secures to the localities the selection of their local officers it does not in express terms protect the functions of such officers from legislative or State interference. But the appellant's counsel insist, and no doubt rightly, that we may read into the constitution by implication from the history of the State at or prior to the time of the adoption of the constitution that the assessment of property for the purpose of taxation is a local function. So far I may agree with them and find ample authority in the decisions of the courts for so doing. But when they insist that under the implied provisions of the constitution such assessment is *exclusively* a local function in the sense that the State cannot interfere with it or confer upon officers appointed by State authority the function of valuing tangible property in the streets constituting part of a special franchise, notwithstanding such property has heretofore been assessed by local assessors, I find myself unable to yield my assent.

While an act of the legislature must stand the test as to whether its provisions are counter to the clearly implied, as well as to the express, provisions of the constitution, yet I cannot conceive it to be the duty of the court to aid in reading into the fundamental law matters of doubtful or uncertain implication in order thereby to effect the condemnation of an otherwise valid act.

In considering this question some elementary principles may
787 first be alluded to. The legislative power is absolute and unlimited, except as restrained by the State or Federal Constitution. (*Bank of Chenango v. Brown*, 26 N. Y., 467; *People v. Flagg*, 46 N. Y., 401; *Lawton v. Steele*, 119 N. Y., 232; *Railroad Co. v. County of Otoe*, 16 Wall. U.S., 667.) The power to tax is inherent in government and is a legislative power limited only by constitutional provisions. (*Town of Guilford v. Supervisors of Chenango Co.*, 13 N. Y., 143; *Clark v. City of Rochester*, 24 Barb., 446.) The security for the abuse of this power is to be found in the responsibility of the members of the legislature to their constituents and not in the courts. (*People v. Mayor of Brooklyn*, 4 N. Y., 426.) Cities, counties and towns are but the instrumentalities for the convenient administration of local government; upon them, subject to constitutional limitations, the legislature may confer the power to tax to the extent necessary to good government and the imposition of a tax by cities, counties or towns for their support is as much an exercise of the taxing power of the State as a tax imposed directly by the State. (25 Am. & Eng. Enc. of Law, 80, 1st ed.) The power to assess is but an incident of the power to tax. The function of assessing for the purpose of taxation is a governmental agency for the proper division of the burdens of taxing and is but one of the elements in rendering the power of taxation effective.

In the *Town of Guilford v. Supervisors of Chenango*, *supra*, it was said, "Our State government is an independent existence, representing the sovereignty of the people. The power of the legislature is the power of that sovereignty, and is supreme in all respects, and unlimited in all matters pertaining to legitimate legislation, except in those instances where the people have, in their fundamental law, limited or restricted it. Taxation is indisputably a legis-
788 lative power. The constitution of this State will be searched in vain for any clause which contains any restriction or limitation on the taxing power of the legislature."

If the legislature possesses such power with respect to taxation I can see no reason why with respect to a function which is but a part of the governmental machinery in carrying into effect the laws relating to taxation the legislature may not lawfully provide, as has been done by the amendment in question, that the State Board of Tax Commissioners may value the tangible property in the streets as a portion of the special franchises made taxable by the amendment.

The State has a direct interest in local assessments, for upon these assessments State as well as local taxes are paid. It has an indirect interest in them so far as they are made the basis of local taxation, because of its regard for the efficiency of local government and for the well being of all the municipalities which go to make up the State.

At the time of the adoption of the earlier constitutions, when it is claimed that the principle of local assessments became a part of our governmental system, there was not a railroad track, a telegraph

line, a gas main or an electrical subway in existence. The right to assess and tax these various kinds of property in the streets has from time to time, and mostly in comparatively recent years, been conferred upon the local authorities by the legislature. If the legislature can increase the powers and functions of the assessors, as it has done repeatedly, why may it not take from these powers and functions, at least to the extent of that which it has given. If this tangible property in the streets had always been taxable there would be more force in the contention that the local assessors had a constitutional right to value it for taxation, but the right to assess it at all has been given since the adoption of the earlier con-
789 stitutions and this right is all that has been withdrawn by the act in question.

The constitution has not stood in the way of the withdrawal by the State of various functions from many local officers other than assessors and conferring such functions upon officers appointed by central or State authority. This principle has been sanctioned by the court of appeals in many cases. It was done as to police officers in *People v. Draper*, 15 N. Y., 532, and *People v. Shepard*, 36 N. Y., 285; as to firemen in *People v. Pinckney*, 32 N. Y., 377; as to commissioners of excise in *Board of Excise v. Barrie*, 34 N. Y., 657; as to health officers in *Board of Health v. Heister*, 37 N. Y., 661; as to officers having supervision of street improvements in *Astor v. The Mayor, etc., of New York*, 62 N. Y., 567; as to commissioners of highways in *People ex rel. Kilmer v. McDonald*, 69 N. Y., 362, and as to boards of supervisors in the erection of public buildings in *People ex rel. Commissioners, etc., v. Supervisors of Oneida Co.*, 170 N. Y., 105.

But it is said that the decisions in these cases and in others of analagous character, were justified in the exercise of the police power of the State, and not otherwise. The court, however, failed to put its decision in most of these cases on that ground, nor did it give that question any prominence in any of them. Other sufficient reasons were found for the conclusions reached.

While it is entirely correct to say that the State has a great interest in maintaining good order through an efficient police force, in the protection of property and lives by well conducted fire departments, in promoting the public health, in the regulation of the liquor traffic, in the maintenance of good roads and in other public improvements, yet none of these matters are of greater concern to the State than the power to exist, which depends upon the right
790 in the legislature to levy taxes and, as incidental thereto, to have some power concerning assessments for that purpose.

The cases which are cited to support a contrary doctrine are cases where the legislature attempted to abolish local *offices* in the face of the express terms of the constitution, and confer the functions of such officers upon officers of State selection. The case of *The People v. Raymond*, 37 N. Y., 428, is one of these cases.

The appellant relies largely upon that case for its contention that the assessment of property for the purpose of taxation is exclusively a local function. That was an action to determine the title of the

defendant to the office of commissioner of taxes and assessments of the city and county of New York and the only question in the case was as to whether or not an act of the legislature under which the defendant was appointed to that office by the governor and senate violated the home rule provisions of the constitution and it was held that it did, and that the legislature could not create a new office and vest the appointment in a central or State authority when the duties of the office were those of a former county or city officer made elective by the constitution. While it was said in that case that "there is no question but that the office in question is exclusively a city office," it was not there decided, nor could it have been, for the question was not up, that the function of assessing property for the purpose of taxation was exclusively a local function. The case is therefore not an authority for that proposition, nor do I know of any case that is. I think the question is an open one and must be decided in this case as a new proposition. That the *Raymond* case is not conclusive on this question, it seems to me, is clearly indicated by the court of appeals in the later case of *Astor v. The Mayor, supra*, where it was held that a law that
791 took from local officers and conferred upon the commissioners of Central park, who were officers appointed by the legislature, the exclusive care, management and control for the purpose of regulating, grading and improving certain streets in the city of New York, was not unconstitutional, and where it was stated in the opinion of the court that, "it would be carrying the doctrine of non-interference with local officers far beyond any reported case, to hold that in no case whatever could any of the powers existing in a local officer, at the time of the adoption of the constitution, be taken away without violating the provision cited."

The intangible property, constituting a part of these special franchises, is made taxable by the amendment in question for the first time. It is of very large value. It is so closely related to and so inseparably connected with the tangible property in the streets, constituting a part of the special franchises, that it would be very difficult, if not impracticable, to value the intangible separate and distinct from the tangible property. (*People v. O'Brien*, 111 N. Y., 1.) The State board has not so valued it in this case and this court has held in an unreported case that a provision in a writ of *certiorari* requiring that board to state the values upon the tangible and intangible property separately was not justified under the law.

Nor is it practicable for special franchises, in many instances, to be valued by local assessors without extending their functions and jurisdiction beyond their tax districts, for the reason that such franchises frequently cover property extending into several tax districts and the property in one district would have little value when disconnected with the property in the other districts but would have great value when taken as a part of the whole. It is also a kind of property requiring expert knowledge on the part of those who are to value it and knowledge which few local assessors possess.

792 To hold that the legislature cannot commit to a State authority the duty of valuing for the purpose of taxation tangible property in the streets to the extent permitted by the amendment in question and under the circumstances existing here, requires, in my opinion, an altogether too strict and illiberal a construction of the constitution.

I think the legislature had the right not only to subject the large amount of intangible property existing as a part of these special franchises to the taxing power of the State but also to provide, as it did, in view of the changed conditions arising from the advancement and progress of our people over those which formerly existed, for the assessment of this intangible and tangible property together, by State officers, and that in so doing it has still left to the localities as large a measure of home rule as they enjoyed in this respect, when the local function of assessing property for taxation became part of our system.

So far reference has been had to the validity of the amendment under the State constitution. With reference to its validity under the Federal Constitution and to all the other questions discussed by the learned referee in the various opinions written by him, I agree with his reasoning and also with his conclusion and that of the special term, that the amendment is a valid exercise of legislative power.

I think the order should be affirmed with costs.

793 *Notice of Appeal.*

Supreme Court, Appellate Division, Third Department.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The Twenty-third Street Railway Company, Respondent,
against
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. Stearns, Tax Commissioners, Composing the State Board of Tax Commissioners, Appellants.

SIRS: You will please take notice that the above named appellants, George E. Priest, J. Edgar Leaycraft and Lester F. Stearns, together constituting the State board of tax commissioners of the State of New York, hereby appeal to the court of appeals of the State of New York from the final order of the appellate division of the supreme court, third department, entered in the office of the clerk of the county of Albany on the 20th day of February, 1903, and from the whole of said order, except that part thereof which affirms the order of the special term herein upon the facts.

Dated February 21, 1903.

Yours, etc.,

JOHN CUNNEEN,
Attorney-General,
Attorney for Appellants, Capitol, Albany, N. Y.

To the clerk of the county of Albany and to Henry A. Robinson, attorney for relator-respondent.

794 *Stipulation.*

Court of Appeals, State of New York.

THE PEOPLE OF THE STATE OF NEW YORK on the Relation of The Twenty-third Street Railway Company, Respondent,
against
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Tax Commissioners, Composing the State Board of Tax Commissioners, Appellants.

It is hereby stipulated under section 3301 of the Code of Civil Procedure that the foregoing are true and correct copies of all of the papers and evidence upon which the court below acted in making the order on file in the office of the clerk of Albany county and of all the evidence and papers upon appeal herein upon which this proceeding was heard in the appellate division of the supreme court, the memorandum of decision by the appellate division, the order of the appellate division, the opinions of Parker, P. J., and Kellogg, Smith and Chester, JJ., and the notice of appeal to the court of appeals, and certification thereof as required by section 1353 of the Code of Civil Procedure, is hereby waived.

Dated March 1, 1903.

JOHN CUNNEEN,
Attorney-General, Attorney for Appellants.
HENRY A. ROBINSON,
Attorney for Relator-Respondent.

795 At a special term of the supreme court of the State of New York, held at the court house in the city of Albany, N. Y., on the 20 day of June, 1903.

Present: Hon. D. Cady Herrick, justice.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* TWENTY-THIRD Street Railway Company
vs.
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Constituting the State Board of Tax Commissioners of the State of New York.

This cause having been brought on upon the remittitur herein, sent down from the court of appeals, and now filed with this court, by which remittitur it appears that an appeal was taken by the defendants herein, from the order of the appellate division of this court to the said court of appeals, and that upon such appeal the said order of the appellate division of this court was reversed, and the order of the special term herein affirmed by such court, with costs, and that the record of proceedings had been directed by said

court of appeals to be remitted to this court, and this court directed to enforce the said judgment of the court of appeals, according to law,

796 Now, therefore, on motion of John Cunneen, attorney general, attorney for the respondents,

It is ordered and adjudged, that the judgment of the said court of appeals be and the same hereby is made the judgment of this court; and that the respondents George E. Priest, J. Edgar Leaycraft and Lester F. Stearns, as constituting the State board of tax commissioners of the State of New York, have execution against The Twenty-third Street Railway Company, relator, for their costs, when adjusted by the clerk, and inserted in this judgment, and that this order or judgment be annexed to the judgment-roll.

Enter.

D. CADY HERRICK,
Jus. Sup. Ct.

797 [Endorsed:] Supreme court. People *ex rel.* Twenty-third Street Railway Company, *vs.* George E. Priest, J. Edgar Leaycraft, *et al.*, constituting the State board of tax commissioners. Original. Order. John Cunneen, attorney-general, capitol, Albany, N. Y. Filed Albany county, N. Y. Jun- 22 2.20 p. m. 1903 Clerk's office.

798 Supreme Court, Albany County.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* TWENTY-THIRD Street Railway Company
vs.
GEORGE E. PRIEST, J. EDGAR LEAYCRAFT, and LESTER F. STEARNS, Constituting the State Board of Tax Commissioners of the State of New York.

An order in this proceeding in favor of the respondents and against the relator having been made by the special term of this court on the 15th day of July, 1902, and duly entered in the office of the clerk of the county of Albany on said date, upon the report of a referee, reducing the assessment of the special franchise of the relator, as it appears upon the assessment-roll of the city of New York for the year 1900, from the sum of one million, nine hundred seventy-nine thousand, two hundred seventy-six dollars to the sum of one million, three hundred twenty-six thousand, one hundred fourteen and 92/100 dollars, and confirming the assessment of said special franchise, as so corrected and reduced, and the relator having appealed from said order to the appellate division of this court for the third department, and the said order having been affirmed upon the facts and reversed upon the law by the appellate division of this court aforesaid, and the order of reversal thereon having been rendered on the 6th day of January, 1903, and the re-

spondents having appealed therefrom to the court of appeals, and the said court of appeals have sent hither its remittitur, filed herein on the first day of May, 1903, by which it appears that the
799 said court of appeals has reversed the order of the appellate division herein, and affirmed that of the special term, with costs, and has given judgment accordingly, and has remitted the judgment of the said court of appeals to this court, to be enforced according to law, and this court having by an order entered herein the 22 day of June, 1903, ordered that said judgment be made the judgment of this court, and the respondents' costs having been adjusted at the sum of three hundred twenty-nine & 55 / 100 dollars,

Now, on motion of John Cunneen, attorney general, attorney for the respondents,

It is adjudged, that the judgment of the said court of appeals be and the same is hereby made the judgment of this court, and

It is further adjudged, that the respondents George E. Priest, J. Edgar Leaycraft and Lester F. Stearns, constituting the State board of tax commissioners of the State of New York, recover of the relator, The Twenty-third Street Railway Company, the sum of three hundred twenty-nine & 55 / 100 dollars, their costs, as adjusted herein, and that they have execution therefor.

JOHN FRANEY, *Clerk.*

Dated June 22, 1903.

800 [Endorsed:] B. 80 p. 329. Supreme court. People *ex rel.* Twenty-third Street Railway Company, *vs.* George E. Priest, *et al.*, constituting the State board of tax commissioners. Original. Judgment. John Cunneen, attorney-general, capitol, Albany, N. Y. Filed Albany county, N. Y. Jun- 22 2.20 p. m. 1903. Clerk's office.

801 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the supreme court of the State of New York, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said supreme court of the State of New York on a remittitur from the court of appeals of the State of New York, being the highest court of law or equity of the said State in which a decision could be had, before you, or some of you, between The People of the State of New York *ex rel.* Twenty-third Street Railway Company, plaintiff-respondent, and The State Board of Tax Commissioners, defendant-appellant, wherein was drawn in question the validity of a statute of and an authority exercised under said State on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened to the great damage of the said People of the State of New York *ex rel.* Twenty-third Street Railway Company, as by its complaint appears, we being willing

that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within thirty days from the date hereof, in the said Supreme Court, that, the record, and proceedings aforesaid being inspected, the said Supreme Court
802 may cause further to be done therein to correct that error *which* of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 27 day of June in the year of our Lord one thousand nine hundred and three.

[Seal of the U. S. Circuit Court, Northern District N. Y.]

W. S. DOOLITTLE,
Clerk of the Circuit Court of the United States
for the North. District of New York,
By C. W. HIGGISON, *Deputy.*

Allowed by
R. W. PECKHAM,
Associate Justice of the United States Supreme Court.

803 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* Twenty-third Street Railway Company, plaintiff in error, against State Board of Tax Commissioners, defendant in error. Original Writ of error. Henry A. Robinson, att'y for plaintiff in error, 621 Broadway, borough of Manhattan, New York city, N. Y. Filed Albany county, N. Y. Jun- 29 11.31 a. m. 1903 Clerk's office.

804 Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* TWENTY-THIRD Street Railway Company, Plaintiff in Error,
against
STATE BOARD OF TAX COMMISSIONERS, Defendant in Error.

Petition for Writ of Error.

Now comes The Twenty-third Street Railway Company, the above named relator, by Henry A. Robinson, its attorney, and says that on the 28th day of April, A. D. 1903, the court of appeals of the State of New York made and entered a final order and judgment herein, in favor of The State Board of Tax Commissioners, defendant in error above named, and against The People of the State of New York, *ex rel.* Twenty-third Street Railway Company, plaintiff

in error above named, and afterwards, and on the 22nd day of June A. D. 1903, the records and proceedings in said cause having been remitted to the supreme court of the State of New York in and for Albany county, said final order and judgment of the court of appeals were made and entered as the final order and judgment of said supreme court, in which final order and judgment and the proceedings had prior thereunto in this cause certain errors were committed to the prejudice of the said relator, all of which will more in detail appear from the assignment of errors which is filed with this petition.

The said court of appeals of the State of New York is the
805 highest court of the said State of New York in which a decision in this cause could be had.

Wherefore, your petitioner prays that a writ of error may issue in this behalf from the Supreme Court of the United States to the supreme court of the State of New York for the correction of the errors and reversal of the judgment so complained of; that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to said Supreme Court of the United States, that said writ of error operate as a supersedeas, that the amount of security which the petitioner shall give and furnish on said writ of error may be fixed, and that upon the giving of such security, all further proceedings in said court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

Dated the 26th day of June, 1903.

HENRY A. ROBINSON,
Attorney for Petitioner.

The writ of error as prayed for in the foregoing petition is hereby allowed, and the bond is fixed at the sum of $1000.

Dated the 26 day of June, A. D., 1903.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

806 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* Twenty-third Street Railway Company, plaintiff in error, against State Board of Tax Commissioners, defendant in error, Original Petition for writ of error. Henry A. Robinson, att'y for plaintiff in error, 621 Broadway, borough of Manhattan, New York city. Filed Albany county, N. Y. Jun-29 11.31 a. m. 1903 Clerk's office.

807 Supreme Court of the United States.

PEOPLE OF THE STATE OF NEW YORK *ex Rel.* TWENTY-THIRD Street Railway Company, Plaintiff in Error,
against
STATE BOARD OF TAX COMMISSIONERS, Defendant in Error.

Assignment of Errors.

Now comes The Twenty-third Street Railway Company, the above named relator, by Henry A. Robinson, its attorney, and, in connection with the petition for a writ of error filed herewith, says that in the records and proceedings in this cause and in the final order and judgment made and entered herein on the 20th day of June, A. D. 1903, by the supreme court of the State of New York, on a remittitur from the court of appeals of the State of New York, there is manifest error in this, to wit:

I.

Error in declining to hold that the act of the legislature of the State of New York, approved May 26th, 1899, (ch. 712, L. 1899), entitled "An act to amend the tax law, in relation to the taxation of public franchises as real property," in so far as it authorizes the assessment imposed by the State Board of Tax Commissioners on March 20, 1900, upon the franchises of The Twenty-third Street Railway Company, relator above named, deprives said relator of its property without due process of law, in contravention of the fourteenth amendment to the Constitution of the United States.

808 II.

Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, denies to said relator the equal protection of the laws, in contravention of the fourteenth amendment to the Constitution of the United States.

III.

Error in declining to hold that said legislative enactment, in so far as it authorizes the said assessment, impairs the obligations of contracts, in contravention of section 10, article I. of the Constitution of the United States.

Dated the — day of June, 1903.

HENRY A. ROBINSON,
Attorney for Petitioner.

809 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* Twenty-third Street Railway Company, plaintiff in error, against State Board of Tax Commis-

sioners, defendant in error. Original. Assignment of errors. Henry A. Robinson, att'y for plaintiff in error, 621 Broadway, borough of Manhattan, New York city, N. Y. Filed Albany county, N. Y. Jun- 29, 11.31 a. m. 1903 Clerk's office.

810 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the State Board of Tax Commissioners and John Cunneen, attorney general of the State of New York, its attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden in the city of Washington, in the District of Columbia, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of New York, for the county of Albany, in an action wherein The People of the State of New York *ex rel.* Twenty-third Street Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable R. W. Peckham associate justice of the Supreme Court of the United States, this 26th day of June, in the year of our Lord one thousand nine hundred and three.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Copy of the above citation received by me at the office of the attorney-general of the State of New York, this 29 day of June, A. D. 1903.

JOHN CUNNEEN,
Attorney-General.

811 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* Twenty-third Street Railway Company, plaintiff in error, against State Board of Tax Commissioners, defendant in error. Original Citation. Henry A. Robinson, att'y for plaintiff in error, 621 Broadway, borough of Manhattan, New York city, N. Y. Filed Albany county, N. Y. Jun- 29 1.58 p. m. 1903 Clerk's office.

812 *Bond on Writ of Error.*

Know all men by these presents, that we, The Twenty-third Street Railway Company, a corporation, as principal, and Fidelity and Deposit Company of Maryland, a corporation, as surety, are held and firmly bound unto the State Board of Tax Commissioners in the full and just sum of one thousand dollars ($1,000.), to be

paid to the said State Board of Tax Commissioners, its successors and assigns, to which payment, well and truly to be made, we bind ourselves, our and each of our successors and assigns, jointly and severally, by these presents.

Sealed with our seals, and dated the 23rd day of June, in the year of our Lord, nineteen hundred and three.

Whereas, lately in the supreme court of the State of New York, in a suit pending in said court between said People of the State of New York *ex rel.* Twenty-third Street Railway Company, plaintiff-respondent, and said State Board of Tax Commissioners, defendant-appellant, a judgment was rendered on a remittitur from the court of appeals of the State of New York against said People of the State of New York *ex rel.* Twenty-third Street Railway Company, plaintiff-respondent, in favor of said State Board of Tax Commissioners, defendant-appellant, and said plaintiff-respondent having obtained from a justice of the Supreme Court of the United States a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse said judgment in the aforesaid suit, and a citation directed to said State Board of Tax Commissioners, citing and admonishing them to be and appear at a Supreme Court of the United
States, to be holden at the city of Washington, District of
813 Columbia, within thirty days from date thereof.

Now, the condition of the above obligation is such, that if the said Twenty-third Street Railway Company, a corporation as aforesaid, shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the above obligation to be void, otherwise to remain in full force and effect.

[CORPORATE SEAL.]
TWENTY-THIRD STREET RAILWAY COMPANY,
By D. B. HASBROUCK, *Vice-President.*

[CORPORATE SEAL.]
FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By HENRY B. PLATT, *Vice-President.*

Attest: JAMES R. KINGSLEY, *Attorney-in-fact.*

Sealed and delivered in the presence of:
HENRY P. MOLLOY.

STATE OF NEW YORK, }
County of New York, } ss.:

On this 23rd day of June, 1903, before me personally came D. B. Hasbrouck to me known, who, being by me duly sworn, did depose and say that he resided in New York city, Brooklyn borough that
he is the vice-president of the Twenty-third Street Railway
814 Company, the corporation described in and which executed the above instrument, that he knew the seal of said

corporation; that the seal affixed to said instrument was such corporate seal, that it was so affixed by order of the board of directors of said corporation and that he signed his name thereto by like order.

[NOTARIAL SEAL.] WALTER N. GRIMSHAW,
Notary Public, Kings Co. (105).

Certificate filed in New York county.

815 STATE OF NEW YORK, } ss:
County of New York, }

On the 23rd day of June, in the year 1903 before me personally came Henry B. Platt, to me known, who, being by me duly sworn, did depose and say, that he resided in the city of New York; that he was the vice-president of the Fidelity and Deposit Company of Maryland, the corporation described in, and which executed the within instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said company do not exceed its assets as ascertained in the manner provided in section 3, of chapter 720, of the Session Laws of the State of New York for the Year 1893. And the said Henry B. Platt further said that he was acquainted with James R. Kingsley, and knew him to be the attorney-in-fact of said company; that the signature of the said James R. Kingsley, subscribed to the within instrument, was in the genuine handwriting of the said James R. Kingsley, and was subscribed thereto by like order of the board of directors, and in the presence of him the said Henry B. Platt.

ERNEST L. HICKS,
Notary Public, New York County.

At a regular and lawful meeting of the board of directors of the Fidelity and Deposit Company of Maryland, at which a quorum was present, held at the office of the company, in the city of Baltimore, State of Maryland, on the sixth day of March, 1901, on motion, it was unanimously

"*Resolved*, That in pursuance of section eight hundred and eleven "of the Code of Civil Procedure of the State of New York, Henry B. "Platt, vice-president, or George Sewell Bonner, attorney, or Frank H. "Platt, Edward T. Platt, Joseph A. Flynn, Hugh M. Allwood and "James R. Kingsley, attorneys-in-fact of this company, in the State "of New York, be, and each of them is, hereby authorized and em- "powered to sign, execute and deliver any and all bonds or under- "takings for or on behalf of this company, and to attach thereto the "seal of the corporation, the same to be attested by the said George "Sewell Bonner, attorney of the company or by either one of the "other persons above named, as occasion may require."

COUNTY OF NEW YORK, *ss:*

I, James R. Kingsley, attorney-in-fact, of the Fidelity and Deposit Company of Maryland, have compared the foregoing resolution with the original thereof, as recorded in the minute book of said company, and do hereby certify that the same is a true and correct transcript therefrom, and of the whole of the said original resolution. Given under my hand and the seal of the company, at the city of New York, this 23rd day of June, 1903.

JAMES R. KINGSLEY,
Attorney-in-fact.

Fidelity and Deposit Company of Maryland.

Statement, December 31st, 1902.

Resources.		*Liabilities.*	
Real estate	$670,000 00	Capital stock	$2,000,000 00
Stocks and bonds	2,723,100 00	Surplus and undivided profits	2,876,233 57
Railroad bonds	2,059,600 00	Premium reserve	717,297 87
Net premiums due	102,807 25	Claims in process of adjustment	31,012 45
Cash in bank, etc	235,058 63	Claims reported	166,021 99
	$5,790,565 88		$5,790,565 88

STATE OF NEW YORK, }
County of New York, } *ss:*

James R. Kingsley, being duly sworn, says that he is the attorney-in-fact of the Fidelity and Deposit Company of Maryland; that the foregoing is a true and correct statement of the financial condition of said company, as of December 31st, 1902, to the best of his knowledge and belief, and that the financial condition of said company is as favorable now as it was when such statement was made.

JAMES R. KINGSLEY.

Subscribed and sworn to before me, this 23rd day of June, 1903.

ERNEST L. HICKS,
Notary Public, New York County.

The foregoing bond and surety is hereby approved this 26 day of June A. D. 1903.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

816 [Endorsed:] Supreme Court of the United States. People of the State of New York *ex rel.* Twenty-third Street Railway Company, plaintiff in error, against State Board of Tax Commissioners, defendant in error. Copy Bond on writ of error. Henry A. Robinson, att'y for plaintiff in error, 621 Broadway, borough of Manhattan, New York city, N. Y.

817 STATE OF NEW YORK, } ss:
County of Albany, }

I, John Franey, clerk of said county and also clerk of the supreme court of State of New York, held therein, do hereby certify that the annexed record of papers on appeal to the court of appeals of said State, remittitur issued by and from said court of appeals, the order of the supreme court pursuant to the said remittitur and the judgment in pursuance of said order thereon, are the originals thereof, entered and filed in this office; that attached thereto are the writ of error with allowance thereon; the petition for said writ with allowance thereof and fixing amount of security therefor, made thereon; the citation with acceptance of service thereof; assignment of error, and the same are the originals thereof; and a copy of the bond or writ of error, which I have compared with the original thereof on file in this office and find the same to be a true copy of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed my official seal this 29 day of June 1903.

[Seal Albany County, July, 1847.]

JOHN FRANEY,
Clerk of Albany County and of Supreme Court of State of New York.

818 THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* METROPOLITAN STREET RAILWAY COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE TWENTY-THIRD STREET RAILWAY COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* THE CENTRAL CROSSTOWN RAILROAD COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* CONSOLIDATED GAS COMPANY OF NEW YORK, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* BROOKLYN CITY RAILROAD COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* CONEY ISLAND AND BROOKLYN RAILROAD COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

THE PEOPLE OF THE STATE OF NEW YORK *ex Rel.* NEW AMSTERDAM GAS COMPANY, Respondent, *v.* State Board of Tax Commissioners, Appellant.

1. Constitutional law—Transfer of essential functions of local officers to State officers prohibited—Home rule provision const. art. 10, § 2.—The home rule provision of the constitution (art. 10, § 2) providing that "all city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such
819 authorities thereof, as the legislature shall designate for that purpose," protects all essential or exclusive functions theretofore belonging to local officers and prohibits their transfer, whether direct or indirect, to State officers.

2. Construction of home rule provision as affecting taxation.—This provision, however, when invoked in relation to taxation should be considered in connection with the supreme taxing power of the legislature and neither should be so construed as to embarrass or cripple the other. Home rule, as understood and practiced in the past, giving to localities the right to govern themselves, but not to hamper the government of the State, should be carefully protected from open attack or indirect invasion. Shadows, however, should give way to

substance, and the right to create a new system of taxation and bring in property of a new character, hitherto untaxed, with some other property incidental thereto and worthless without it, cannot be denied upon principle and should not be withheld from the legislature.

3. Corporations—General franchises defined.—The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the State. Such franchise, however, gives the corporation no right to do anything in the public highways without special authority from the State or some municipal officer or body acting under its authority.

4. Special franchises defined.—A special franchise is the right granted to a corporation to construct, maintain or operate in a public highway some structure intended for public use, which except for the grant would be a trespass.

5. Tax—Special franchise tax act—L. 1899, ch. 712—Substance of statute.—Chapter 712 of the Laws of 1899, amending the general tax law and authorizing for the first time in the history of the State the assessment or valuation for the purpose of general taxation of all special franchises by a State board of tax commissioners appointed by the governor, declares in substance that the right, authority or permission to construct, maintain or operate some structure, intended for public use, "in, under, above, on or through streets, highways, or public places," such as railroads, gas pipes, water mains, poles and wires for electric, telephone and telegraph lines, and the like, is a special franchise. For the purpose of taxation such a franchise is made real estate and is "deemed to include the value of the tangible property of a person, copartnership, association or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise," and taxed as a part thereof. (§ 2, subd. 3.) This includes nothing but what is in the street, directly or indirectly, and excludes power houses, depots and all structures without the lines of the street. The taxes thus imposed are for general purposes, are collected in the same way, and used for the same objects as other taxes upon the general assessment roll.

6. Act not violative of home rule provision—It creates new system of taxation, requiring officers with new functions to en-
820 force it—Tangible property connected with special franchises is an inseparable part thereof, forming an entity which was never taxable by local assessors.—The fact that such statute confers upon State officers the right to assess such franchises and especially the right to assess the tangible property annexed thereto and included therein by the act, which

was formerly assessed by local boards of assessors, does not violate the principle of home rule embodied in the constitution. 1. Because it creates a new system of taxation and brings within its range a new character of property, which required new methods of valuation and the exercise of functions which never belonged to local assessors and must necessarily have been committed to State officers with new functions whose sole duty related to the subject of taxation in all its phases throughout the entire State, and who, with wider experience and greater opportunities for observation than local assessors, would be able to grasp the new scheme of taxation as a whole and whose action would be free from all local prejudice or color and uniform in its result. 2. Because the tangible property formerly assessed by local assessors is an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which in a going concern can neither be assessed nor sold to advantage except as one thing, single and entire, and the function of assessing such entity is not essentially local in character, never belonged to localities, never was and never could be exercised with the requisite justice and uniformity by their officers, and, therefore, was of necessity conferred upon State officers, expert tax officials, having a jurisdiction coextensive with the limits of the State. Property, therefore, created by the legislature and never intrusted by it to local assessors cannot with propriety be said to have been taken away from them.

7 Authorities on home rule question collated.—The authorities relating to the home rule provision of the constitution collated and discussed.

8. Decisions, not expressions of judges used *arguendo*, establish legal principles.—Legal principles are not established by expressions of learned judges, used *arguendo* in their opinions in a given case, but by what was decided therein, and what is written is not evidence of what was decided unless it relates directly to the question presented for decision.

9. Franchises taxable as other property—Act is not violative of Federal Constitution as impairing the obligation of contracts.—A franchise, whether general or special, is taxable the same as other property, and, therefore, the statute taxing special franchises, which changes no part of the grant, alters no stipulation, increases no payment, exacts nothing from their owners that is not exacted from the owners of property generally, does not impair the obligation of a contract and cannot be regarded as violating the Federal Constitution.

10. Additional objections overruled.—Contentions that the act is impracticable and incapable of execution; that the special fran-
821 chises should have been separately assessed; that the State

Tax Commissioners adopted no rule in making the assessments; that the relators did not have a proper hearing at the time provided for review, and that due process of law was not observed in the taxation of their property, after due consideration, are overruled.

People ex rel. Met. St. R'y Co. v. Tax Com'rs, 79 App. Div. 184, reversed.

People ex rel. T. T. St. R'y Co. v. Tax Com'rs, reversed.

People ex rel. C. C. R. R. Co. v. Com'rs, reversed.

People ex rel. N. A. Gas Co. v. Tax Com'rs, 79 App. Div. 643, reversed.

People ex rel. C. Gas Co. v. Tax Com'rs, 79 App. Div. 643, reversed.

People ex rel. C. I. & B. R. R. Co. v. Tax Com'rs, 79 App. Div. 643, reversed.

People ex rel. B. C. R. R. Co. v. Tax Com'rs, 79 App. Div. 643, reversed.

(Argued April 6, 1903; decided April 28, 1903.)

Appeal in each of the above-entitled proceedings from an order of the appellate division of the supreme court in the third judicial department, entered January 30, 1903, which reversed an order of special term reducing and confirming as reduced an assessment upon the special franchises of the respective relators.

The assessments in question were made in the year 1900, pursuant to the provisions of the tax law, as amended by chapter 712 of the Laws of 1899. Separate writs of certiorari, granted to review the respective assessments, resulted in an order in each proceeding appointing a referee to take and report to the supreme court such evidence upon the several issues raised by the petition, writ and return as might be adduced before him by the parties, with his findings of fact and conclusions of law thereon. After taking many pages of evidence the referee made separate and complete findings of fact appropriate to each proceeding, and as conclusions of law in each found "that chapter 712 of the Laws of 1899 is a valid and constitutional enactment, practicable and operative, and that it gave authority to the defendants to assess the relator's special franchises for the purpose of assessment and taxation; that the relator had a hearing and due process of law before the defendants upon the review of its assessment * * * and was not deprived of any of its legal or constitutional
822 rights; that it was lawful to assess as one franchise the franchise, right, authority or permission which the relator had in the streets of New York and which it operated as one system; that to equalize its assessment with the assessment of other real property in the city of New York, the relator is entitled to a deduction," the amount being named in each proceeding, "and that the assessment as thus reduced must be taken as the value of the relator's special franchise for the purposes of assessment and taxation under the act."

The supreme court adopted the findings both of fact and law made by the referee and directed that final orders be entered in accordance therewith. From the order so entered in each proceeding the relator therein appealed to the appellate division, which affirmed as to the facts but reversed as to the law, upon the ground that the statute in question was in violation of the "home rule" provision of the constitution. Two of the justices dissented. The State Board of Tax Commissioners appealed to this court from the several orders entered accordingly.

John Cunneen, attorney-general (*William H. Wood* of counsel), for appellant. The entire statute is valid. There is no arbitrary line which separates the official functions which properly belong to local officers from those which properly belong to State officers. The power to make the distinction is vested in the legislature. (Const. of 1777, § 20; Const. of 1821, art. 4, § 15; Const. of 1846, art. 10, § 2; *Matter of Henneberger*, 155 N. Y. 421; *People ex rel. v. Albertson*, 55 N. Y. 50; *Matter of N. Y. D. R'y Co.*, 42 Hun, 621; 107 N. Y. 42; *People ex rel. v. Lorillard*, 135 N. Y. 285; *Rathbone v. Wirth*, 150 N. Y. 459; *N. Y. F. Dep't v. A. S. Co.*, 106 N. Y. 577; *People v. Cheritree*, 6 T. & C. 473; *Greaton v. Griffin*, 4 Abb. Pr. [N. S.] 310; *Hanlon v. Bd. of Supvrs.*, 57 Barb. 383; *City of Syracuse v. Hubbard*, 64 App. Div. 587.) It is within the power of the legislature to create a new office to be filled by a State officer and to transfer the power of valuing property to it, even though this power has, since
823 before 1777, been exercised by local assessors. (*Matter of Allison v. Welde*, 172 N. Y. 421; *People v. Raymond*, 37 N. Y. 431.) The subject of assessment and taxation is the "right," "privilege" or "franchise" to occupy a street. The "tangible" property employed in the exercise of this right is merely incidental to the right. Prior to the enactment of chapter 712 of the Laws of 1899 the property thereby rendered assessable had never been assessed locally and, therefore, the local assessors are deprived of no function. (*Matter of N. Y., W. S. & B. R. R. Co.*, 37 Hun, 317; *Ritchmyer v. Morss*, 3 Keyes, 349; *Matter of McPherson*, 104 N. Y. 306; *Matter of Romaine*, 127 N. Y. 80; *People v. H. Ins. Co.*, 92 N. Y. 328; *H. Ins. Co. v. New York*, 134 U. S. 594.) The franchises granted by the municipal authorities to the relators herein to use public streets are property. (*People v. O'Brien*, 111 N. Y. 1; *People v. Dechan*, 153 N. Y. 528; *Ingersoll v. N. E. R. R. Co.*, 157 N. Y. 453.) The grant of property by the State or by a municipal corporation, upon payment therefor of a consideration, payable either in gross or by annual payments, and expressed in the grant, does not carry with it any implied condition or agreement that the property so granted shall be forever thereafter exempted from taxation. Taxation of the property so granted is not an impairment or change of the contract by which the grant was made. (*People ex rel. v. Board of Commissioners*, 76 N. Y. 64; *People v. Commissioner of Taxes*, 82 N. Y. 459; *People ex rel. v. Davenport*, 91 N. Y. 574; *Delaware Railroad Tax*, 18 Wall. 206; *M. G. L. Co. v. Shelby County*, 109 U. S. 398; *N. O., C. & L. R. R. Co. v. New Orleans*, 143 U. S. 192; *Ford v. D. & P. L.*

Co., 164 U. S. 662.) A law which imposes a tax upon property for public use and in which provision is made for notice to the person taxed, a hearing before the assessing officers, and an opportunity for review by the courts does not take property without due process of law. (*Kentucky R. R. Tax Cases*, 115 U. S. 321; *McMillen v. Anderson*, 95 U. S. 37; *Lent v. Tillson*, 140 U. S. 316; *Palmer v. McMahon*, 133 U. S. 660; 824 *Paulsen v. Portland*, 149 U. S. 30; *Stuart v. Palmer*, 74 N. Y. 183.) It is possible to ascertain the value of a special franchise with substantial correctness and the act is not void from impracticability. (*People v. Davenport*, 91 N. Y. 574; *People v. Feitner*, 54 App. Div. 217; *People v. Coleman*, 107 N. Y. 541; *People ex rel. v. Barker*, 144 N. Y. 94; *People ex rel. v. Barker*, 146 N. Y. 304; *C. S. R'y Co. v. Common Council*, 125 Mich. 673; *A. E. Co. v. State Auditor*, 166 U. S. 185.) The assessments are not illegal, because several special franchises belonging to the same corporation and all in the same tax district, were assessed as a unit and not separately. (*People ex rel. v. Feitner*, 65 App. Div. 318; 169 N. Y. 604; *C. S. R. R. Co. v. Common Council*, 125 Mich. 683.)

David B. Hill for respondents. The function of assessment for the purposes of taxation is inherently a local function and adheres to the counties, cities, towns and villages of the State with substantially the like effect as though there was an express provision therefor in the constitution, and such function cannot be transferred to officials not elected or appointed by such localities. (*People v. Raymond*, 37 N. Y. 428; *Matter of Brenner*, 170 N. Y. 185; *People v. Albertson*, 55 N. Y. 50; *Rathbone v. Wirth*, 150 N. Y. 459; *People ex rel. v. McKinney*, 52 N. Y. 374; *People ex rel. v. Crooks*, 53 N. Y. 648; *People ex rel. v. Foley*, 148 N. Y. 677; *People ex rel. v. Randall*, 151 N. Y. 497; *People ex rel. v. Palmer*, 154 N. Y. 133.)

Charles F. Brown, *David B. Hill*, *Frank H. Platt*, and *William H. Page, Jr.*, for Metropolitan Street Railway Company, respondent. The effect of the special franchise tax law is to transfer to the office of State Tax Commissioners the function of assessing a large class of property for local purposes, which, at the adoption of the constitution, was a function of the office of city, town or village assessors. This the legislature had no power to do. (*People* 825 *v. Raymond*, 37 N. Y. 428; *People ex rel. v. McKinney*, 52 N. Y. 374; *People v. Albertson*, 55 N. Y. 50; *Matter of Brenner*, 170 N. Y. 185; *Matter of Allison v. Wilde*, 172 N. Y. 421; *People v. Draper*, 15 N. Y. 532.) The assessment of property has always been the function of a local officer. (1 Dowell's Hist. of Taxation, 70, 74; 1 Stubbs' Const. Hist. of England [3d ed.], chs. 12, 14, 15; Howard's Local Const. Hist. of U. S. ch. 4, subd. 6; *People v. Harding*, 53 Mich. 481; *People v. Hurlbut*, 24 Mich. 44; *Slaughter House Cases*, 16 Wall. 36.) The assessment of property for the purposes of taxation is a function of local officers, who are required to be selected as provided by section 2 of article 10 of the constitution. (*People v. Raymond*, 37 N. Y. 428; *Warner v. People*, 2 Den. 272; *People v. Albertson*, 55 N. Y. 50; *People v. Priest*, 169 N. Y. 432.) The special fran-

chise tax law cannot be sustained upon the fact that a franchise to use streets, highways and public places was not at the adoption of the constitution subject to direct taxation, or upon the theory that the relation between the franchise and the tangible property in connection therewith is such that the legislature is justified in withdrawing the latter from the jurisdiction of local assessors and requiring both classes of property to be assessed together by State officials. (L. 1900, ch. 254, § 42; *People v. Albertson*, 55 N. Y. 50.) The special franchise tax law cannot be sustained upon the grounds that the amount of property withdrawn from the jurisdiction of local assessors is so inconsiderable that the home rule principle of the constitution is not violated. (*McCulloch v. Maryland*, 4 Wheat. 316; *Met. Bd. of Excise v. Barrie*, 34 N. Y. 657.) The contention that it is within the power of the legislature to take to itself and resume the appointment and control of offices for the purpose of performing administrative duties throughout the whole State, even though such administrative duties were at the adoption of the constitution performed by local officers in the cities, towns and villages of the State for local purposes, cannot be sustained. (Dillon on Mun. Corp. [4th ed.] § 12;
826 *Rathbone v. Wirth*, 150 N. Y. 459; *People v. Hurlburt*, 24 Mich. 44; *People v. Acton*, 48 Barb. 524; *Devoy v. Mayor, etc.*, 36 N. Y. 449; *People v. Pinckney*, 32 N. Y. 377; *People ex rel. v. Common Council*, 28 Mich. 228; *Att'y-General v. Bd. of Councilmen*, 58 Mich. 213; *City of Evansville v. State*, 118 Ind. 427; *State ex rel. v. Denny*, 118 Ind. 382; *People v. Shepherd*, 36 N. Y. 285.) The Board of Tax Commissioners erred in assessing all the special franchises of the relator as a single franchise instead of "fixing and determining the value of each" as required by section 42 of the tax law. (*May v. Traphagen*, 139 N. Y. 478.) The contention that the relator is the owner of several special franchises and that each is a separate piece of property is sustained by consideration of the legal character of the property and by the provisions of law applicable thereto. (*May v. Traphagen*, 139 N. Y. 478; *People ex rel. v. Dolan*, 126 N. Y. 166; *People ex rel. v. Clapp*, 152 N. Y. 490; *People ex rel. v. Barker*, 18 App. Div. 248; *Williams v. N. Y. C. R. R. Co.*, 16 N. Y. 97; *Craig v. R. C. & B. R. R. Co.*, 39 N. Y. 404; *People v. Kerr*, 27 N. Y. 188; *Milhau v. Sharp*, 27 N. Y. 611; *People v. Cassidy*, 46 N. Y. 46; *People v. O'Brien*, 111 N. Y. 1.)

William H. Page, Jr., for Twenty-third Street Railroad Company *et al.*, respondents. The legislature of this State cannot appoint or authorize central authorities to appoint any local officer, nor can the legislature create State officers to perform an inherently local function of government. (*Sheboygan v. Parker*, 3 Wall. 93; *Matter of Mayor, etc.*, 99 N. Y. 569; *People ex rel. v. State Bd. of Canvassers*, 129 N. Y. 360; *Rathbone v. Wirth*, 150 N. Y. 459; *People v. Mosher*, 163 N. Y. 32; *People v. Ball*, 46 N. Y. 57; *People v. McKinney*, 52 N. Y. 374; *People v. Crooks*, 53 N. Y. 648; *People v. Foley*, 148 N. Y. 677; *People v. Acton*, 48 Barb. 524; *Matter of Brenner*, 170 N. Y. 185.) The function of assessing property—of perfecting a valuation of

property as a basis of taxation—is to be exercised exclusively
827 by local officers, and, therefore, the officers who exercise that function in New York city must be "city officers" within the meaning of the "home rule" provision of the State constitution. (*People v. Raymond*, 37 N. Y. 428.) The effect of the special franchise tax act is to deprive the local assessor of the function of assessing taxable property, and is, therefore, unconstitutional. (*People ex rel. v. Priest*, 169 N. Y. 432; *People v. Hastings*, 29 Cal. 449.) The history of the assessment of taxable property in New York State shows conclusively that the function of assessment has always been regarded as a purely local function, and it is impossible to suppose that the people intended to confer upon the legislature the power to interfere with this immemorial custom. (1 Colonial Laws, 14, 61, 131; 2 Colonial Laws, 269; 3 Colonial Laws, 577; 4 Colonial Laws, 419; 5 Colonial Laws, 858; *Goodell v. Jackson*, 20 Johns. 693; *Matter of Allison v. Welde*, 172 N. Y. 421; *People ex rel. v. Potter*, 47 N. Y. 375; *Pope v. Phifer*, 3 Heisk. 682.) This court has upheld the right of the legislature to interfere with local administration of certain State police powers. (*People ex rel. v. Draper*, 15 N. Y. 532; *Metro. Bd. of Excise v. Barrie*, 34 N. Y. 657.) But the assessment of property as a basis of taxation has always been as a matter of fact, and has been held to be as a matter of law, exclusively a local function of government. (*People v. Raymond*, 37 N. Y. 428.) Special franchises must be valued by a local officer, because the special franchise tax act provides for the imposition of a property tax, and not a license fee. (*Matter of Swift*, 137 N. Y. 77.) The contention that the so-called "special franchise" constitutes a new species of property, with the characteristic distinguishing features that it is partly intangible and not localized does not warrant its assessment by a State official. (*City of Buffalo v. Le Couteulx*, 15 N. Y. 451; *M. S. Bank v. City of Rochester*, 37 N. Y. 365; Cooley's Const. Lim. [6th ed.] 220.)

Frank H. Platt for Consolidated Gas Company of New York,
828 respondent. The special franchise tax law taxes only the rights of a company to use streets, and its tangible structures in the streets used in connection with those rights. The tax is laid on no other property or right. The valuation must be of the special franchise, separate from all other rights and property. (*People ex rel. v. Dolan*, 126 N. Y. 166.) The considerations which influenced the commissioners in making their assessment of the company's special franchises afforded no true test of the value of those special franchises, and resulted in no actual valuation thereof. The assessment was a mere arbitrary determination. (*People ex rel. v. Ganley*, 29 N. Y. S. R. 135; *City of Syracuse v. Stacy*, 45 App. Div. 249; *People ex rel. v. Barker*, 146 N. Y. 304; *People ex rel. v. Coleman*, 126 N. Y. 433; *State R. R. Tax Cases*, 92 U. S. 575; *C., C., C. & St. L. R. R. Co. v. Backus*, 154 U. S. 439; *A. E. Co. v. Ohio State Auditor*, 165 U. S. 194; *People ex rel. v. Barker*, 139 N. Y. 55; 141 N. Y. 251; *People ex rel. v. Barker*, 165 N. Y. 305.) The valuation of property according to some proper principle of valuation is essential to the validity of an assessment, and, as the valuation of the State board

was a mere arbitrary determination, the assessment should be set aside. (*Lee v. Parry*, 4 Den. 125; *Doughty v. Hope*, 3 Den. 594; *Powell v. Tuttle*, 3 N. Y. 396; *People v. Supervisors*, 11 N. Y. 563; *Middletown v. Berlin*, 18 Conn. 189; Cooley on Taxation, 353, 354; *Woodman v. Auditor-General*, 52 Mich. 28; *Greenough v. Fulton Coal Co.*, 74 Penn. St. 486; *People v. Hastings*, 29 Cal. 449; *People ex rel. v. Coleman*, 126 N. Y. 433; *People v. Weaver*, 100 U. S. 539.) The company is aggrieved by the assessment, and has shown itself entitled to relief. (*People ex rel. v. Barker*, 148 N. Y. 70; *People ex rel. v. Coleman*, 126 N. Y. 433; *People ex rel. v. Barker*, 146 N. Y. 304; 152 N. Y. 417; *People ex rel. v. Dederick*, 161 N. Y. 195; *People ex rel. v. Barker*, 139 N. Y. 55.) There is no method by which the value of a special franchise can be ascertained. (*People ex rel. v. Dolan*, 126 N. Y. 166; *People ex rel. v. Clapp*, 152 N. Y. 490; *People v. Kerr*, 27 N. Y. 188; *Kellinger v. F. S. S. R'y Co.*, 50 N. Y., 206; *Zollikoffer v. Havemeyer*, 2 Hun, 300; *Matter of Adams*, 141 N. Y. 297; *Matter of B., H. T. & W. R. Co.*, 22 Hun, 176; *People ex rel. v. Com'rs*, 104 N. Y. 240; *State R. R. Tax Cases*, 92 U. S. 575; *C., etc., R. R. Co. v. Backus*, 154 U. S. 439.) As there is no method of ascertaining the values of special franchises, the franchise tax act is impossible of execution. (*People ex rel. v. Morgan*, 168 N. Y. 1; *Hughes' Case*, 1 Bland, 46; *Ward v. Ward*, 37 Tex., 389; *Chaffee's Appeal*, 56 Mich., 244; *Drake v. Drake*, 4 Dev. 110.) The assessment of the special franchises of the company should be set aside, because the board undertook to assess all of its special franchises as one franchise instead of assessing each franchise separately. (*E. E. Co. v. N. H. E. L. Co.*, 35 Fed. Rep. 233.)

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Charles A. Collin, *William F. Sheehan*, *John L. Wells*, *Thomas L. Hughes*, *Charles H. Werner* and *Charles V. Nellany* for The Brooklyn City Railroad Company, respondent. There is a clear distinction between a corporate charter, constituting the contract of incorporation, which is legislative in its character and subject to legislative alteration, amendment or repeal, and legislation constituting a business contract with a private corporation which is essentially contractual in character, and is not subject to legislative alteration, amendment or repeal, without the consent of the private corporation, party to the contract. (*Langdon v. Mayor, etc.*, 93 N. Y. 129; *People v. O'Brien*, 111 N. Y. 1.) Such franchise contracts as form part of the special franchises of these respondent corporations (whether such franchise contracts are constituted directly by State legislation accepted by the corporations, or by municipal ordinance, authorized by the legislature and in like manner accepted by the corporations) are business contracts, protected by the Federal Constitution from impairment by legislative alteration, amendment or repeal, without consent of the corporations. (*City of Walla Walla v. W. W. W. W. Co.*, 172 U. S. 1.) The taxing power cannot be invoked by the State to raise itself above the position of a private person, as regards the sacred observance of its business contracts. (*Murray v. City of Charleston*, 96 U. S. 432; *Hartman v. Greenhow*, 102 U. S. 672.) In

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the absence of provisions in the franchise contract itself, reserving the right of the State or municipality to alter, amend or repeal the contract, neither the State nor the municipality can, without the consent of the grantee in the franchise contract, either by State or municipal legislation, or by State constitutional amendment, change the terms of the franchise contract so as to avoid an express stipulation therein on the part of the municipality. (*City of Walla Walla v. W. W. W. Co.*, 172 U. S. 1; *V. W. Works Co. v. Vicksburgh*, 185 U. S. 65; *L. F. El. & W. Co. v. City of Little Falls*, 102 Fed. Rep. 663; *N. O. G. L. Co. v. L. L., etc., Co.*, 115 U. S. 650; *N. O. W. W. Co. v. Rivers*, 115 U. S. 674; *L. G. Co. v. C. G. L. Co.*, 115 U. S. 674; *S. T. W. W. Co. v. N. O. W. W. Co.*, 120 U. S. 64; *Am. W. W. Co. v. H. W. Co.*, 115 Fed. Rep. 171; *C. R'y Co. v. C. S. R'y Co.*, 166 U. S. 557; *B. C. R. R. Co. v. B. C. R. R. Co.*, 32 Barb. 358.) The taxation of the franchise contracts of public service corporations where the right to impose such tax is not expressly or impliedly reserved in the franchise contracts would be an impairment of the obligation of the contracts, and would, therefore, be unauthorized and void. (*Mayor, etc. v. S. A. R. R. Co.*, 32 N. Y. 261; 34 Barb. 41; *Mayor, etc., v. T. A. R. R. Co.*, 33 N. Y. 42; *Stein v. Mayor, etc.*, 49 Ala. 362; *Los Angeles v. L. A. W. Co.*, 61 Cal. 65; *Los Angeles v. L. A. W. Co.*, 177 U. S. 588; *S. T. Co. v. City of Medford*, 115 Fed. Rep. 202; *Gordon v. Appeal Tax Court*, 3 How. [U. S.] 133.) The failure of the special franchise tax law to indicate any principle or method for ascertaining the value of the intangible property included in the special franchise, the failure of the State board to attempt any separate valuation of the intangible property and its failure to adopt or proceed upon any principle or method of valuing the totality of intangible and tangible property together constituting the special franchise, and
831 necessarily the substitution therefor of speculation and guesswork in place of judgment in making such valuation amounted to such an absence of quasi-judicial action as to constitute the taking of property without due process of law; and if the statute contemplates such a procedure, the statute itself is unconstitutional for the same reason. (*People ex rel. v. Barker*, 48 App. Div. 248; 152 N. Y. 417; *People ex rel. v. Clapp*, 152 N. Y. 490; *People ex rel. v. Adams*, 125 N. Y. 471; *People ex rel. v. Coleman*, 126 N. Y. 433; *Marsh v. Bd. of Suprs. of Clark Co.*, 42 Wis. 502; *Goff v. Bd. of Suprs.*, 43 Wis. 55; *People v. Weaver*, 100 U. S. 539; *Woodbridge v. Detroit*, 8 Mich. 274; *People v. S. F. S. Union*, 31 Cal. 132.) The State board failed to give the respondent corporations such a hearing as due process of law requires. (*Hager v. Reclamation Dist.*, 111 U. S. 701.)

William N. Dykman for Coney Island and Brooklyn Railroad Company, respondent. The special franchise on Ocean avenue and Fort Hamilton avenue, formerly owned by Prospect Park and Flatbush Railroad Company, should be separately assessed from the special franchise extending from Prospect park to Fulton ferry. (*People v. O'Brien*, 111 N. Y. 1.) The commissioners have adopted an erroneous method of assessment. (*People ex rel. v. Barker*, 152 N. Y. 417.)

John C. Tomlinson and *Edgar J. Kohler* for The New Amsterdam Gas Company, respondent. Things or rights may be property in a legal sense and may have value, and yet that value not be ascertainable in dollars and cents, or capable of admeasurement for the purpose of ad valorem taxation. (*Perry v. City of Big Rapids*, 67 Mich. 146; *Dart v. Woodhouse*, 40 Mich. 399; *Tax Com'rs v. Holiday*, 150 Ind. 216; *People ex rel. v. Clapp*, 152 N. Y. 490; *People ex rel. v. Neff*, 19 App. Div. 585; *H. B. Co. v. Kentucky*, 166 U. S. 150.) A special franchise considered as a distinct piece of property, is in no proper or legal sense capable of valuation, and an assessment thereof
832 cannot be sustained upon the ground that a special franchise, while not susceptible of an accurate admeasurement of value, nevertheless admits of a sufficiently close approach to a correct valuation to suffice for purposes of taxation. (*Taylor v. L. & N. R. R. Co.*, 86 Fed. Rep. 350.)

VANN, *J.*:

These appeals were argued together and the questions of law presented are common to all the proceedings. The only questions peculiar to any case were questions of fact, which have been finally disposed of by the concurrent action of the courts below, as they united in adopting the facts as found by the referee. The main discussion at our bar, as well as in the four opinions written in the appellate division, related to the question whether the statute under which the assessments were made violates that part of the constitution which provides for home rule in certain political divisions of the State. In order to answer this question it will be useful to inquire: (1) What does the constitution prohibit; (2) what does the statute command, and (3) what have the courts held as to the validity of other statutes relating to similar subjects?

The principle of home rule, or the right of self-government as to local affairs, existed before we had a Constitution. Even prior to Magna Charta some cities, boroughs and towns had various customs and liberties which had been granted by the Crown or had subsisted through long user, and among them was the right to elect certain local officers from their own citizens and, with some restrictions, to manage their own purely local affairs. These customs and liberties, with other rights, had been so often trampled upon by the king as to arouse deep hatred of centralization of power, and we find among the many grants of the Great Charter that "the city of London shall have all its ancient liberties and its free customs as well by land as by water. Furthermore, we will and grant that all other cities and burghs and towns * * * shall have all their liberties and free customs." (Cap. 13.) "All evil customs * * * shall immediately be enquired into by twelve knights of the same
833 county, upon oath, who shall be elected by good men of the same county," and after inquisition made "they shall be altogether destroyed by them, never to be restored, provided this be notified to us before it is done." (Cap. 48.) After this marvelous statute, rights, which before had rested largely on custom, rested

on law, with a guaranty against violation by the amazing covenant of King John that if he refused redress for an "excess committed" his subjects should be released from their allegiance and at liberty to make war upon him, "saving harmless our person and the persons of our queen and children and when it hath been redressed they shall obey us as they have done before." (Cap. 61.)

The rights thus secured after a long struggle and by great pressure, although at times denied and violated by the ruling monarch, were never lost, but were brought over by the colonists the same as they brought the right to breathe, and they would have parted with the one as soon as the other. The liberties and customs of localities reappear on a novel and wider basis in the town meetings of New England and the various colonies, including the colony of New York. The right of the inhabitants of townships and manors to meet at stated times in public town meetings, elect town officers and transact town business, was well established while we were a colony and was recognized by different statutes enacted by the governor, council and General Assembly. (Van Schaack, chaps. 1201, 1224, 1419, 1448, 1454, 1459, 1460, 1499, 1536 and 1562; Livingston & Smith, chaps. 43 and 654.)

The business transacted at the town meeting related to highways, care of the poor, and matters of purely local concern. It was confined to the affairs of a small district and was clearly separated from public matters of interest to the colony at large. The officers elected, generally by *viva voce* vote, were supervisors, assessors, collectors, constables, commissioners of highways and overseers of the poor. The powers and duties of these officers were regulated by statute, but the right to select them resided in the people of the locality and was stubbornly insisted upon as inviolable.

831 Such was the state of affairs when the first constitution was adopted. While that instrument organized the State, it granted no rights to the people, but was their own creation, expressing the restraints that they desired to place upon themselves by preserving certain principles and methods of government which they wished to remain unalterable. Thus the constitution of 1777 recognized local self-government as already existing, and continued and protected it, so that it could not lawfully be departed from without changing the constitution itself. It provided that "town clerks, supervisors, assessors, constables and collectors and all other officers heretofore eligible by the people, shall always continue to be so eligible." (§ 29.) Sheriffs, coroners, loan officers, county treasurers, clerks of supervisors and justices of the peace were to be appointed. (§§ 26, 29.) Thus our earliest constitution did not create the right to elect the administrative officers of towns, but continued it as it had existed during the history of the colony while it was under the dominion of the English Crown. The only local officers mentioned by name as "eligible by the people" were town officers, and in fact almost all officers of other local divisions were appointed by central authority.

The second constitution, framed in 1821, continued the right by

the general clause, applicable to county, town, city and village officers, that "all officers heretofore elected by the people shall continue to be elected; and all other officers, whose appointment is not provided for by this constitution, and all officers whose offices may be hereafter created by law, shall be elected by the people, or appointed, as may by law be directed." (Art. 4, § 15.) Sheriffs, coroners and some other county officers were for the first time made elective.

The third constitution, drafted in 1846, continued the principle and expanded the right by the following provision: "All county officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of the respective counties or appointed by the boards of supervisors, or other county officers, as the legislature shall direct. All city, town and village
835 officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof, as the legislature shall designate for that purpose. All other officers, whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct." (Art. 10, § 2.) The same provision was carried forward, *ipsissimis verbis*, into our present constitution. (Art. 10, § 2.)

These and other commands of the different constitutions, when read in the light of prior and cotemporaneous history, show that the object of the people in enacting them was to prevent centralization of power in the State and to continue, preserve and expand local self-government.

This was effected through a judicious distribution of the power of selecting public officers, by assigning the choice of local officers to the people of the local divisions, and to the people generally, those belonging to the State at large. The management of the local political business of localities, whether as large as a county or as small as a village, is intrusted to local officers selected by the communities where those officers act and through which their jurisdiction extends. The principle of home rule is preserved by continuing the right of these divisions to select their local officers, with the general functions which have always belonged to the office. Unless the office, by whatever name it is known, is protected, as the courts have uniformly held, the right to choose the officer would be lost, for with his former functions gone he would not be the officer contemplated by the constitution, even if the name were retained. Unless the office or officer is mentioned *eo nomine* in the constitution, the name may be changed, or the office abolished, provided the functions, if retained at all, remain in some officer chosen by the locality. Local functions, however, cannot be transferred to a State officer. The legislature has the power to regulate, increase or diminish the duties of the local officer, but it has been stead-
836 fastly held that this power is subject to the limitation that no essential or exclusive function belonging to the office can be

transferred to an officer appointed by central authority. The office may go, but the function must be exercised locally if exercised at all. While no arbitrary line is drawn to separate the powers of local and State officers, the integrity of the local office is protected, with its original and inherent functions unimpaired. It is interference, whether direct or indirect, with the vital, intrinsic and inseparable functions of the office as thus defined and understood that the constitution prohibits. (*People ex rel. Wood v. Draper*, 15 N. Y. 532; *People v. Raymond*, 37 N. Y. 428; *People ex rel. Bolton v. Albertson*, 55 N. Y. 50; *Astor v. Mayor, etc., of N. Y.*, 62 N. Y. 567; *Matter of the Mayor, etc., of N. Y.*, 99 N. Y. 569; *Matter of Gertum v. Bd. Supvrs.*, 109 N. Y. 170; *Koch v. Mayor, etc., of N. Y.*, 152 N. Y. 72; *People ex rel. Burby v. Howland*, 155 N. Y. 270; *People ex rel. Com'rs v. Board of Supvrs., Oneida Co.*, 170 N. Y. 105; *Matter of Brenner*, 170 N. Y., 185; *Matter of Allison v. Welde*, 172 N. Y. 421.)

The statute in question authorizes the assessment or valuation, for the purpose of general taxation, of all special franchises by a State board of tax commissioners appointed by the governor. (L. 1899, ch. 712.) The general franchise of a corporation is its right to live and do business by the exercise of the corporate powers granted by the State. The general franchise of a street railroad company, for instance, is the special privilege conferred by the State upon a certain number of persons known as the corporators to become a street railroad corporation and to construct and operate a street railroad upon certain conditions Such a franchise, however, gives the corporation no right to do anything in the public highways without special authority from the State, or some municipal officer or body acting under its authority. When a right of way over a public street is granted to such a corporation, with leave to construct and operate a street railroad thereon, the privilege is known as a
837 special franchise, or the right to do something in the public highway, which, except for the grant, would be a trespass.

The statute, which is an amendment of the general tax law, declares, in substance, that the right, authority or permission to construct, maintain or operate some structure, intended for public use, "in, under, above, on or through streets, highways or public places," such as railroads, gas pipes, water mains, poles and wires for electric, telephone and telegraph lines, and the like, is a special franchise. For the purpose of taxation such a franchise is made real estate and is "deemed to include the value of the tangible property of a person, copartnership or corporation situated in, upon, under or above any street, highway, public place or public waters in connection with the special franchise and taxed as a part thereof." (§ 2, clause 3.) This includes nothing but what is in the street, directly or indirectly, and excludes power houses, depots and all structures without the lines of the street. The taxes thus imposed are for general purposes, are collected in the same way, and used for the same objects as other taxes upon the general assessment roll.

Prior to the passage of this act general franchises had been taxed for the benefit of the State under a valuation made by a State officer,

with the sanction of the courts. (L. 1896, ch. 908, §§ 182, 190; *People ex rel. W. & H. Co. v. Roberts*, 154 N. Y. 101.) Special franchises, however, had never been lawfully assessed either by local or State authority, but were made taxable property by the act before us for the first time in the history of the State. (*People ex rel. Manhattan R. R. Co. v. Barker*, 146 N. Y. 304; *People ex rel. Brooklyn City R. R. Co. v. Neff*, 19 App. Div. 590; affirmed on opinion of Cullen, J., below in 154 N. Y. 763.) The right to assess special franchises by central authority is challenged as a violation of the principle of home rule embodied in the constitution and especially the right to assess the tangible property annexed thereto and included therein by the act, because the latter is withdrawn from the jurisdiction of the local assessors by whom it had been theretofore assessed.

838 Every presumption is in favor of the constitutionality of an act of the legislature and, if the constitution and the act can be reasonably construed so as to enable the latter to stand, it is the duty of the courts to give them that construction; still, it is none the less their duty to adjudge the statute void if it is in plain conflict with the real intent of the fundamental law, when considered in the light of history and in all its aspects. (*Sweet v. City of Syracuse*, 129 N. Y. 316; *People ex rel. Sinkler v. Terry*, 108 N. Y. 1.)

What was the situation that confronted the legislature when it passed this statute to raise money for the support of government?

The governor had officially announced that "the farmers, the market gardeners, and the mechanics and tradesmen having small holdings, are paying an improper and excessive portion of the general taxes." The legislature wished to distribute this burden in a just and equitable manner, to take part of the load from those who carried more than their share and to relieve the farms from some of the effects of depreciation in value through competition with the cheap and fertile lands of the West. It found property scattered all over the State worth nearly two hundred millions of dollars, which was not taxed at all and had never been taxed. This property consisted wholly of special franchises, or privileges given by the State, mainly to corporations furnishing to the public transportation, water, light and other necessities or conveniences of daily life. It had grown rapidly in extent and value during recent years. Its value rested upon the right to use in some manner the public highways of the State, but it was intangible, and doubtless for this reason had never been brought under the taxing power. The legislature also found certain tangible property, which was subject to taxation, situated in the public streets and used only in connection with and as a part of the intangible property not taxed, and of no substantial value except when so used. It found that the valuation of this new kind of property, intangible, invisible and elusive, but of great value, would be attended with peculiar difficulties, which

839 would require a degree of knowledge and skill not possessed by local assessors, but belonging only to experts who had long and carefully studied the subject of taxation in all its varied aspects. The problem was to place a just and adequate value upon

a right capable of valuation, but which was unseen, without form or substance, and, as it were, the mere breath of the legislature. It was a new problem that had never arisen before during the history of the State, and it was to be solved, not to meet local needs, but an exigency of State.

How did the legislature deal with this situation?

It created a new system of taxation, brought within its range a new character of property and assigned the duty of making the valuation to the State Board of Tax Commissioners, composed of tax experts already in office, whose sole duty related to the subject of taxation, in all its phases, throughout the entire State. It made the tax commissioners assessors of this new kind of property known as special franchises, clothed them with power to compel the owners to furnish under oath, in addition to a general report containing many details, such information as they called for; authorized them to call upon the local assessors for all facts that they could furnish and to summon aid from all available sources; required them to give notice to the owner affected and an opportunity to be heard, and provided a remedy for review by the courts of every assessment as soon as it was filed. It commanded that all sums, in the nature of a tax, paid by the owner of a special franchise to a municipality for its exclusive use, should be deducted from the tax imposed for local purposes, and exempted the tangible property situated in public highways, and used in connection with the special franchise, from all other forms of taxation. (§§ 2, 42, 43, 44, 45, 46.) The new kind of property was termed real estate, just as it might have been termed personal property, or neutral property, without changing its nature, which was such as local assessors had never dealt with.

The statute should be considered in the light of the circumstances existing when it was passed, which were extraordinary and unprecedented. The system thus created had never been known before, and, as its main subject, the act dealt with special franchises, which had never been taxed before. Property unknown as the subject of taxation to the framers of any of our constitutions was brought into the system, which required new methods of valuation and the exercise of functions which had never belonged to local assessors. The property was *sui generis*, and from its nature could not be valued by local officers. Unless it escaped taxation in the future as it had in the past, it was necessary to commit the power to other officers with new functions, wider experience and greater opportunities for observation, who would be able to grasp the new scheme of taxation as a whole. We should not be misled by the terms "valuation" or "assessment," as the simple exercise of judgment, for no work can be done without that, but should compare the intrinsic nature of the functions exercised by the local assessors for time out of mind with those intrusted to the State tax commissioners, which had never been committed to any board or officer before.

The local assessors dealt with tangible property, which could be seen and was open to the judgment of ordinary men, or with written

evidence of debts or contracts the value of which could be easily computed. It was their habit to measure, weigh and count; to learn the market value from current sales; to pass upon physical and material property which they were accustomed to own, rent or use, and with which they were familiar in their daily life. They saw it, knew it and could judge as to its value. It was before their eyes and they could act upon it directly, without resort to complicated computations.

On the other hand, the valuation of special franchises had never been attempted before, but presented a new field of action and called for the exercise of new and different functions. They could not be seen, handled, measured, weighed or counted. They were specialties and had no market value. There were no sales to guide and no experience from ownership, rental or use to rely upon. The
841 new property is real estate in name, but not in reality, for it is a mere privilege to do something in public streets and places not permitted to citizens generally. While local in a narrow sense it is unconfined in its real nature, for it depends largely on the earning capacity of a going concern, frequently with several special franchises, but with no means of determining the amount earned by each. The value depends upon so many conditions, existing, frequently, in localities widely separated and upon such a complication of facts and figures that the valuation cannot be safely intrusted to men of common knowledge and experience. What greater calamity in the shape of taxation could threaten the vast interests involved than to intrust this important subject to unskilled and incompetent men, some of them willing it may be not only to protect their own localities at the expense of others, but to oppress corporations and favor individuals? The burden could not be distributed equally for each local board would have its own method and theory. Uniform action would be impossible and conflict and confusion would result. A wider view, a different kind of judgment, a balancing of localities and figures, an adjustment and equalization of burdens and an exercise of functions not local in nature were required to meet the situation. As we said in a recent case: "It is no disparagement of the capacity and intelligence of the average assessor to say that it would present to him a problem incapable of accurate solution and a rule of action in the performance of his official duty impossible in practice." (*People ex rel. D., L. & W. R. R. Co. v. Clapp*, 152 N. Y., 490, 495.)

The legislature also brought in as an incidental part of the system some tangible property which had been previously assessed by local authority. No tangible property, however, was affected, except such as was situated in the public highways and was so incidental to and dependent upon the special franchises as to have no substantial value unless used in connection with them. The relation between the intangible right to run cars in the streets and the tangible property in the rails to run the cars on, is so intimate as to be
842 inseparable in any practicable system of estimating values. Of what value are poles, strung with wires, standing in the

street, without a special franchise to use them to carry electricity or send the mysterious message? What are appliances worth, when made for a special purpose, if they cannot be used for that purpose? What are rails and ties worth, when so fastened to the land in a public highway as to be legally a part of it, without a special franchise to place and use them *them* there as part of a railroad? All the mains and pipes, poles and wires, rails and ties of the relators, when separated from their special franchises, have no value except as firewood or old iron. Their only substantial value is the right to use them in connection with the franchise, and, hence, they are incidental to the franchise. As part of the franchise they are worth something, but severed from it nothing to speak of. Suppose a street railroad company should forfeit its special franchise by a violation of the grant, what would its rails and ties be worth? They would cease to exist as rails and ties, and would become simply so much old material and even the title would vest in the owner of the fee. The expense of grading, placing them in position and paving around them, which is a large part of the original cost, would cease to be an investment and would be property no longer. They are worth virtually nothing except for railroad purposes and a railroad cannot occupy a street without a special franchise. Separate them from the franchise by taking away the street privilege, and they are destroyed. Their only value as rails and ties, as distinguished from so much old wood and iron, is gone. Taking the broad and practical view of the subject, which the legislature had the right to take in creating the new system, they have no assessable value worthy of notice, except through the actual and constant use made of them as incidental to the special franchises. The value of either resides in the union of both and can be practically ascertained only by treating them as a unit. Unless assessed together, both cannot be adequately assessed. A man of judgment, in valuing a wagon
843 and especially in estimating its earning capacity, does not pass upon the body, wheels, top and tongue separately. We regard the tangible property as an inseparable part of the special franchises mentioned in the statute, constituting with them a new entity, which as a going concern can neither be assessed nor sold to advantage, except as one thing, single and entire. (*People v. O'Brien*, 111 N. Y. 1; *Gue v. Tide Water Canal Co.*, 24 How. [U. S.] 257; *Hammock v. Loan and Trust Co.*, 105 U. S. 77; *Buncombe County Commissioners v. Tommey*, 115 U. S. 122.)

The function of assessing a special franchise does not in its nature belong to a county, city, town or village, for it has never been exercised by officers of such localities, but to the State, by which it is now exercised for the first time. It is not exclusively local in character and home rule applies only to functions peculiar to localities. It was unknown to our forefathers who brought over primitive home rule, to the colonists who preserved or to the founders of the State who developed it. It is no part of local self-government as known to history, or to learned judges who have written upon home rule in the past. It did not come within the experience of former times and

was not contemplated by the framers of our constitutions. They kept purely local affairs under local control, but this is not local in intrinsic character, for the power to be exercised is not confined to the limits of one community. While some special franchises are within a single tax district, others extend through several and sometimes into different towns, cities, and villages. The legislature could not make a law for each case, and in bringing the new system into operation it provided by general rule for all cases of the same general character, whether then existing or expected in the future.

Moreover, a special franchise, now confined to one tax district, may by expansion, through merger, consolidation, leasing and the like, extend into other tax districts. Such an enlargement is open to all, has been the experience of many and may be the experience of all.

The same corporation may have many special franchises, con-
844 tinuous or separate, yet they are all practically one, because they all belong to one system, the earning capacity of which may be ascertained, but not that of each special franchise independent of the others. By removing a central franchise, the line is broken and the value of all seriously impaired. The combination of all into a single enterprise gives the highest, if not the only value to each. What would a franchise in a town be worth with no right to enter a city or village? While the strength of the chain is in the links, the value of the links is in the chain. Hence, a franchise is not essentially local in character and may require action, observation and estimate beyond the lines of a single tax district, or the accustomed jurisdiction of local assessors. An examination of the books of the corporation may be necessary in making the valuation, yet they may not be kept in the municipality of the assessors' residence. A highway may be local, but the title thereto is not, for whether a fee or an easement it is held in trust for the people at large, represented by the State, which has control of the streets and of the erections therein. (*People v. Kerr*, 27 N. Y. 188.) The franchise is the right to put something in the highway and use it there, and if the right fails, the title to what was thus placed goes with the general title.

The special franchises of a railroad in operation from a city into suburban towns may be properly treated as an aggregation, without a precise *situs*, as one piece of property producing a gross income, as a single subject of valuation, like all the personal property of an individual, from one end of the line to the other, although the amount when ascertained must be apportioned and distributed among the several tax districts affected (§ 42). This can make no difference to the company, for it has only so much to pay in any event, and it shows that the work of valuation is not local, but general in its character, and that it is a matter of central rather than municipal concern. It affects the general public rather than the people of a community. The subject is one that local officers cannot handle, because they cannot consider it as a whole by going without their precincts, but must stop at the boundaries of their several
845 districts. They cannot make the distribution among localities interested in the special franchises. Local assessors still

remain local assessors, with every accustomed function intact and unimpaired. Local self-government is untouched and there is no invasion of local functions. While special franchises were known when the later constitutions were adopted, they were not then known as taxable property. The office of assessor of special franchises was then unknown. It is not local in nature, but is a new office with new functions adapted to property of a new kind and differing in principle from any ever dealt with by local assessors. Property created by the legislature and never intrusted by it to the local assessors cannot with propriety be said to have been taken away from them.

The entire taxing power belongs to the legislature and not a dollar can be raised for local or general purposes, to carry on self-government in localities or in the State, or to provide for the public safety, order or health except by its authority. This supreme power should be considered in connection with the home rule provision of the constitution, and neither should be so construed as to embarrass or cripple the other. Home rule, as understood and practiced in the past, giving to localities the right to govern themselves, but not to hamper the government of the State, should be carefully protected from open attack or indirect invasion. Shadows, however, should give way to substance, and the right to create a new system of taxation and bring in property of a new character, hitherto untaxed, with some other property incidental thereto and worthless without it, cannot, as we think, be denied upon principle and should not be withheld from the legislature unless required by some controlling decision of the court.

While *is* is difficult to classify all the authorities relating to the subject of home rule, the most of them fall into convenient groups. At the head of the first class stands the celebrated judgment of Chief Judge Denio in *People ex rel. Wood v. Draper* (15 N. Y. 532). In that case the statute combined four counties into one police
846 district, invested five police commissioners appointed by the governor, acting as a board with the mayors of two cities in the district, with all the powers previously belonging to certain local officers of said cities respectively. The new board was authorized to appoint and control all the policemen, who were to act in any part of the district, regardless of residence or county lines. The validity of the act was upheld upon the ground that the commissioners thus appointed were not city officers, although it was strongly challenged at the bar and by a vigorous dissenting opinion, as a violation of the home rule provision of the constitution.

Similar acts creating a new system by erecting a metropolitan fire district, a metropolitan health district, a metropolitan board of excise and a capital police district, each embracing the territory of two or more municipal divisions of the State, were also sustained, although functions formerly belonging to local officers were transferred to State officials. (*People v. Pinckney*, 32 N. Y. 377; *Metropolitan Board of Health v. Heister*, 37 N. Y. 661; *Metropolitan Board of*

Excise v. Barrie, 34 N. Y. 657; *People ex rel. McMullen v. Shepard*, 36 N. Y. 285.)

An act, however, which established a police district consisting of a city, with a police force already organized, and "three small patches of sparsely settled territory, in all less than a square mile," was held unconstitutional as an obvious attempt to evade the restrictions relating to home rule, because it was designed for the city only, and the outside fragments could have been brought into the city if it was deemed necessary to extend police protection to them. (*People ex rel. Bolton v. Albertson*, 55 N. Y. 50.)

All these cases, except the last, involved the right to erect two or more separate and independent municipalities into a new civil division, to authorize officials appointed by the State to perform the duties formerly discharged by local officers and yet leaving the municipalities in full existence and untouched in all other respects.

Acts authorizing State officials to construct public buildings, parks and highways, the expense of which was to be paid
847 locally, have been uniformly sustained, although the power to make such improvements had been previously vested in the local authorities and it was urged that the transfer of the power was an encroachment upon local self-government. (*People ex rel. McLean v. Flagg*, 46 N. Y. 401; *Astor v. Mayor, etc., of N. Y.*, 62 N. Y. 567; *People ex rel. Kilmer v. McDonald*, 69 N. Y. 362; *People ex rel. Com'rs v. Board of Suprs. Oneida Co.*, 170 N. Y. 105.)

To the next group may be assigned statutes which, directly or indirectly, authorized the appointment of local officers by State officials, or the legislature, or extended the terms of local officers already elected, or limited the power of local authorities in the appointment of local officers. Such legislation has been condemned as in manifest violation of home rule. (*Warner v. People*, 2 Den. 272; *Devoy v. Mayor, etc., of New York*, 36 N. Y. 449; *People v. Raymond*, 37 N. Y. 428; *People ex rel. Fowler v. Bull*, 46 N. Y. 57; *People ex rel. Williamson v. McKinney*, 52 N. Y. 374; *People ex rel. Lord v. Crooks*, 53 N. Y. 648; *Rathbone v. Wirth*, 150 N. Y. 459; *People ex rel. Balcom v. Mosher*, 163 N. Y. 32; *Matter of Brenner*, 170 N. Y. 185.) In *People v. Raymond*, which is the chief reliance of the relators, there was an absolute overthrow of the local assessor and the transfer of all his functions to a State officer, which, as the court held, deprived "the people of the city of a right secured to them by the constitution."

The remaining cases decided in this court are not readily classified, but as the validity of the statutes involved was not disturbed, no analysis thereof is necessary. (*People ex rel. Einsfeld v. Murray*, 149 N. Y. 367; *Matter of Allison v. Welde*, 172 N. Y. 421; *People ex rel. Taylor v. Dunlop*, 66 N. Y. 162; *Matter of the Mayor, etc., of N. Y.*, 99 N. Y. 569; *Matter of McPherson*, 104 N. Y. 306; *Matter of Gertum v. Bd. Suprs.*, 109 N. Y. 170; *People ex rel. Kemmler v. Durston*, 119 N. Y. 569; *Koch v. Mayor, etc., of N. Y.* 152 N. Y. 72.)

When new systems have been created for the management
848 of the indigent insane, the infliction of the death penalty or the punishment of convicts, formerly confined by sheriffs in

county jails, by imprisonment in penitentiaries, no question seems to have been raised or claim made that such legislation interfered with the principle of home rule. The absence of adjudicated cases relating to these and other subjects which might be mentioned is not without significance. It is also significant that the revisers of our present constitution, acting but a few years ago, made no change in the home rule provision, as it indicates that they were satisfied with the subject as it had been expounded by the courts and acted upon by the people.

None of the cases cited had to do with such a peculiar situation and novel conditions as faced the legislature when it passed the act to tax special franchises. Certain expressions of learned judges, used *arguendo*, in discussing the subject of home rule, are relied upon by counsel as establishing a principle that controls this case. Principles are not established by what was said, but by what was decided, and what was said is not evidence of what was decided, unless it relates directly to the question presented for decision. "General expressions," as the great Federal jurist once said, "are to be taken in connection with the cases in which those expressions are used." (*Cohens v. Virginia*, 6 Wheat. 264, 399.)

A more specific review of the authorities is unnecessary, for it is sufficient to state that neither singly nor collectively have they so construed the constitution as to prevent the legislature, under the circumstances existing when it sought to promote a sound public policy by passing the act in question, from creating a new system of taxation, embracing within it a new character of property including incidental additions, and committing the power of assessment to a State board of experts.

The remaining questions raised by the relators do not require elaborate consideration. We cannot sustain their position that the taxation of a special franchise impairs the obligation of a contract and thus violates the Federal Constitution. (Art. 1, § 10.)
849 The franchises are grants which usually contain contracts, executed by the municipality, but executory as to the owner. They contain various conditions and stipulations to be observed by the holders of the privilege, such as payment of a license fee, of a gross sum down, of a specific sum each year or a certain percentage of receipts, as a consideration, or "in full satisfaction for the use of the streets." There is no provision that the special franchise, or the property created by the grant, shall be exempt from taxation. Such a stipulation would be void, for no municipality has power to withdraw property from the taxing power of the State, or to provide by ordinance or contract that it shall be free for all time from the common burden which property generally has to bear. Taxation is the rule, with every presumption to support it, while exemption is an exception, with every presumption against it.

The condition upon which a franchise is granted is the purchase price of the grant, the payment of which in money, or by an agreement to bear some burden, brought the property into existence, which thereupon became taxable at the will of the legislature, the

same as land granted or leased by the State. There is no implied covenant that property sold by the State cannot be taxed by the State, which can even tax its own bonds, given to borrow money for its own use, unless they contain an express stipulation of exemption. The rule of strict construction applies to State grants, and unless there is an express stipulation not to tax, the right is reserved as an attribute of sovereignty. Special franchises were not taxed until by the act of 1899 amending the tax law they were added to the other taxable property of the State. This is all that the statute does, so far as the question now under consideration is concerned. No part of the grant is changed, no stipulation altered, no payment increased and nothing exacted from the owner of the franchise that is not exacted from the owners of property generally. No blow is struck at the franchise, as such, for it remains with every right conferred in full force, but, as it is property, it is required to contribute its ratable share, dependent only upon value, toward the support
850 of government. No burden is placed upon it except such as is borne by the homes of the people and money saved for support in old age.

While all attempts of municipalities to undermine or destroy franchises by changing the terms of the grant have been promptly repressed by the courts, there is no case which holds that a franchise, whether general or special, cannot be taxed the same as other private property. The relators accepted their franchises subject to the right of taxation that applies to all property in the State, and we agree with the learned referee that the special franchise tax takes nothing from the grant, exacts nothing as further compensation for the privilege and impairs no contractual obligation.

The further contention of the relators, that the act is impracticable and incapable of execution; that the special franchises should have been separately assessed; that the State Tax Commissioners adopted no rule in making the assessments; that the relators did not have a proper hearing at the time provided for review, and that due process of law was not observed in the taxation of their property, after due consideration we overrule, without further expression of reasons than already appears.

In reviewing these cases we have received great aid from the strong and exhaustive opinion of the late Judge Earl, for many years a distinguished member of this court, who, acting as referee, decided them in the first instance, after full and careful consideration of all the questions involved. It was the last judicial work of that ripe lawyer and eminent jurist, and we regard his decision as one of the most able and profound judgments ever pronounced by him during his long and useful career.

The order of the appellate division should be reversed and judgment of the special term affirmed, in each proceeding, with costs.

Parker, Ch. J., O'Brien, Bartlett, Martin, Cullen and Werner, JJ., concur.

Order reversed, etc.

851 STATE OF NEW YORK, } ss.:
County of Albany, }

I, W. H. Shankland, clerk of the court of appeals of State of New York, do hereby certify that I have compared the annexed copy of the opinion made by said court in the case of The People of the State of New York *ex rel.* Twenty-third Street Railway Company, respondent against State Board of Tax Commissioners, appellant, with the original thereof on file in this office, and find the same to be a true transcript of and from said original and of the whole thereof.

In witness whereof, I have hereunto set my hand and affixed my official seal this 29th day of June 1903.

[Seal Court of Appeals, State of New York.]

W. H. SHANKLAND,
Clerk of Court of Appeals of State of New York.

852 [Endorsed:] Supreme Court of United States. People of the State of New York *ex rel.* Twenty-third Street Railway Company, plaintiff in error, against State Board of Tax Commissioners, defendant in error. Opinion and certificate of clerk of court of appeals. Henry A. Robinson, attorney for plaintiff in error, 621 Broadway, New York.

Endorsed on cover: File No. 18,996. New York supreme court. Term No. 345. The People of the State of New York *ex rel.* The Twenty-third Street Railway Company, plaintiff in error, *vs.* The State Board of Tax Commissioners. Filed July 7th, 1903.